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REPORTS
OF
CASES IN LAW AND EQUITY,
ARGUED AND DETERMINED
IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

From Decatur Term, 1854, to Savannah Term, 1855, inclusive.

THOS. R. R. COBB, REPORTER.

VOLUME XVI.

Law School

CINCINNATI COLLEGE

ATHENS:

REYNOLDS & BRO.

1855.



Entered according to the Act of Congress, in the year 1855, by THOMAS R.
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HON. EBENEZER STARNES, AUGUSTA,
HON. HENRY L. BENNING, COLUMBUS,
THOS. R. R. COBB, REPORTER, ATHENS,
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C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT DECATUR,
AUGUST TERM, 1854.

Present—JOSEPH H. LUMPKIN,
EBENEZER STARNES, } *Judges.*
HENRY L. BENNING, }

No. 1.—JOSIAH TEDDER, plaintiff in error, *vs.* BENJAMIN E.
STILES, defendant.

- [1.] When the complainant amends his bill after answer, if a further answer to the amended bill is not waived, the defendant must answer the bill as amended, or the complainant will be entitled to an order taking the whole bill, as amended, confessed.
- [2.] If the complainant amend his bill after answer, and does not waive a further answer, the issue is not complete, unless the amendment be answered or the bill taken as confessed.
- [3.] If the complainant amend his bill and waive further answer, it is still the right of the defendant to put in an answer; but failing to do so within the time prescribed, his former answer may stand as an answer to the amended bill; but this rule does not apply where a further answer to the amendment is required.
- [4.] Ordinarily, where the answer and replication are filed the second term, the cause should be set down for trial at the next, being the *third* term after the filing of the bill.
- [5.] The replication should be filed and the cause set down for trial, before the proofs are taken. The replication may be filed, however, *nunc pro tunc*, after the proofs are taken. Until the replication is filed, the defendant has a right to stand on his answer as true, having no notice that it will be controverted.

[6.] Whenever the rights of a party are withheld or violated, the presumption of law is, that he has been injured.

In Equity, in Bibb Superior Court. Decided by Judge POWERS, November Term, 1853.

In this case, the original bill having been answered, and afterwards, an amended bill filed but not answered, the cause was proceeding before the Jury, when defendant moved to arrest its further progress, on the ground that the case was not ripe for trial: the amended bill not being answered and complainant having not taken any order to have the same taken *pro confesso*.

Complainant then moved an order to take the whole bill *pro confesso*, on the ground that defendant had not answered the amendment. The Court refused this motion, but informed complainant's Counsel that they might take their order as to the amended bill alone.

This complainant's Counsel declined to do, but moved the following order, which was granted by the Court, defendant objecting: "that said cause be set down for trial at the present term of said Court, on said original bill and amendment, and the original answer of defendant, replication thereto and proofs in the cause".

The case then proceeded and the Jury returned a decree for complainant.

Complainant then moved the Court that said decree be set aside and a new trial awarded, because the case had been submitted to the Jury, and the decree rendered before the amended bill was answered by defendant, or any interlocutory judgment taken thereon.

On argument, the Court granted an order setting aside the decree and awarding a new trial on the ground stated: and this decision is alleged as error.

WHITTLE, STILES & HILL; R. P. HALL, for plaintiff in error.

POE, NISBET & POE, for defendant.

he Court.—LUMPKIN, J. delivering the opinion.

questions made in this record, are upon points of Equity
e, and are somewhat technical in their character.
original bill in this case, was filed in 1848 by Tedder
to recover the property that belonged to his wife, from
rdian, Mr. Stiles. It was answered in 1849. In 1851,
al in the cause was entered by consent. At the May
1852, of the Superior Court, upon the application of the
inant, leave was granted to amend his bill, by adding
'as a party complainant, as the administrator of his de-
wife; and also, instead of seeking to recover the seven
s which the defendant had taken for the money belong-
his ward, as well as the unexpended surplus of the fund,
pel Mr. Stiles to account for the price of the land, with
thereon, compounded every six years. This amend-
was to be served three months before the next term of the
to-wit: November, 1852. At that term, a demurrer
d to the bill, on account of the misjoinder of the parties;
er, because of the substitution of a new party, who must
e on altogether a different right from that set up in the
l bill.

demurrer was over-ruled, and the defendant ordered to
the *amended bill* within four months. No answer was
at in to the *amended bill*. At May Term, 1853, the de-
t continued the cause, as appears from an entry on the
Docket; but it is not stated upon what ground the con-
ce was allowed. At the November Term, 1853, the
inant moved to take the *whole bill* as confessed. This
urt refused to grant, but offered to permit him to take
amendment as confessed, which offer was declined by the
inant's solicitor. He then moved that the cause be set
for trial at that term of the Court, on the original bill
endment, the answer of the defendant to the original
ie replication thereto and the proofs in the cause. And
der was granted, the defendant, by his Solicitor, objecting
.

A verdict was rendered for \$7,413.12.

The defendant's Solicitor then moved to set aside the decree for irregularity, and it was done ; and this is the decision excepted to.

[1.] The first point which I propose to notice, is whether the first order moved by the complainant's Solicitor was proper, namely: to take the *whole bill* as confessed, because the defendant had failed to answer the amended bill, and notwithstanding he had fully answered the original bill ?

Had we consulted our own opinion in relation to this practice, our judgment probably would have been, that the interlocutory decree of *pro confesso*, should have been taken as to the amendment only. The answer to an amended bill must be co-extensive with the bill as amended. If, then, the defendant has fully answered the original bill, but fails only to answer the amended bill, to take the amendment as confessed, it would seem to subserve every purpose and save much cost and trouble to the parties. But upon examination, we find the practice in England to be well settled to the contrary.

Soon after the practice was first adopted, of taking bills as confessed, without requiring proof thereof, Lord King over-ruled Sir Joseph Jekyl, the Master of the Rolls, in allowing the *whole bill* to be taken as confessed, for want of a further answer. (2 *Peer Wms.* 559.) But he, in effect, in a few months afterwards, over-ruled his own decision, in *Abergavenny vs. Abergavenny* (2 *Eq. Cas. Ab.* 179. 4 *Fin. Abr.* 446, *S. C.*) In the case of *Davis vs. Davis* (2 *Atk. Rep.* 23,) Lord Hardwicke refused to be bound by the decision of Lord King in *Hawkins and Crook*. This was in 1739. In 1772, in *Bacon vs. Griffith* (4 *Ves.* 619, *note*) Lord Apsley, where the Master of the Rolls allowed the *amendments* to the bill, *alone*, to be taken *as confessed*, his Lordship reversed the order upon appeal, holding that the bill, as amended, was but *one record*, and that the amendments not being answered, the *bill* was not answered. A similar decision was made by Lord Alvanley, in the case of *Jopling vs. Stewart*, in 1799. (4 *Ves. Jr.* 619.)

and this continues to be the practice in Great Britain, down to the present day, as appears from some recent cases.

The complainant, then, was clearly entitled to the first motion which he made, to take the *whole bill* as confessed, for instead of a further and full answer; and the Circuit Judge should have allowed him to take that course, instead of proffering to him the privilege of taking the amendment, only, as confessed, which would have been irregular and illegal. And this brings us to the consideration of the final order, which was that the cause be set down for trial at that term of the Court, the original bill, the amendment, the answer of the defendant to the original bill, the replication thereto and the proofs on in the cause.

2.] [3.] This order was wrong in this—that although the complainant had required an answer to his amended bill, he proceeded to trial without any answer ever having been made, and without any interlocutory order—taking it as confessed. Having required an answer, the rule is, that he is not authorized, without the consent of the defendant, to consider the answer to the original bill, as an answer to the amended bill. Indeed, the order does not so treat it. And it is no sufficient reply, to say, that the Court refused to grant the right order, and that the order which it did allow, was the best that could be obtained. The failure in the Court to do what was right, does not justify Counsel in asking, nor the Court in granting, what which is wrong. No issue was made or could be made, until the amended bill was answered or taken as confessed, unless the irregularity had been waived by the defendant. And far from giving his consent to the proceeding, he protested against it.

The issue then, was clearly incomplete, inasmuch as the amended bill had never been answered, neither was there an offer taking it as confessed. If no answer at all had been filed, it is conceded and has been so adjudged by this Court, *see vs. Field et al.* (13 Ga. R. 24,) that a judgment *pro confesso*, was indispensable; otherwise, the issue was not formed. And not the principle the same, when the amended bill is not an-

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swered? And yet, this cause was set down for trial on the original bill, the amendment, the answer, which was to the original bill only, the replication, which could only have been to the answer to the original bill, and the proofs which had been theretofore taken.

What disposition, I ask, is made by the pleadings of the amendment? How is the issue made up as to that? And yet this amendment was essential to the complainant's cause. It was one of substance and not of form; without it, he was not entitled to a decree.

In this view of the pleadings then, they were essentially defective.

But there is another objection to this proceeding. It will be noted that this cause was peremptorily set down for trial, at the same term at which the replication was filed. According to the construction put by this Court, upon the 53d section of the Judiciary Act of 1799, in *Hoxey vs. Carey* (12 Ga. R. 534,) *Leonard vs. Stocks* (*Ib.* 546,) and *McDougald and others vs. Carey*, (*Ib.* 553,) the cause did not stand for trial at the same term at which the replication was filed.

[4.] Ordinarily, when the answer comes in at the second term after the bill is returned, the replication is filed and an order is taken, prospectively, to set the cause down for trial at the next term. The proofs are then taken and the cause is tried at the *third term*, as required by the Statute, or the *fourth*, at farthest, upon special showing. As frequently happens, owing to amendments and other reasons, the pleadings in this case, were not made up at the second term.

[5.] It is usual in practice, to collect the proofs before the replication is filed. The theory of the rule is different. It is true, too, that parties may, by consent, proceed to trial at once, when the cause is set down; they cannot be forced to do it.

But it is argued that the defendant was in *laches*, in not having answered the amended bill. But the punishment for this was to have taken the whole bill as confessed. The complainant could have compelled the Court to have granted him this order. The default of defendant did not authorize the

Court to force him to trial, immediately upon the filing of the replication. He was entitled to a term, according to Equity Practice, and could not be deprived of it without his consent.

[6.] But it is said, that notwithstanding the decree was irregularly obtained, still, it does not appear that the defendant has been injured. Whenever the rights of a party are either withheld or violated, the presumption of law is, that damage has been sustained. And Courts should be very clear that such is not the case, before they act upon the ground here assumed. At any rate, we cannot undertake to say, with certainty, that no detriment has ensued to the defendant, under the facts of this case.

It was his right to have the pleadings perfected, before the cause was set down for trial; and then a term allowed him afterwards, to prepare his proofs. And he was deprived, against his will, of both of these rights.

Judgment affirmed.

No. 2.—SAMUEL TAYLOR and SARAH TAYLOR, plaintiffs in error, vs. BENJAMIN B. SMITH, defendant in error.

[1.] The reputation of witnesses among their neighbors, for truth, is impeached. The testimony of witnesses, to the effect that they are acquainted with the character of the impeached witnesses for truth in their neighborhood, and that from this acquaintance thus derived, they would believe those witnesses on their oath, although as they said, they had never heard that character spoken of, is then received. And the Court charges the Jury that they may weigh this testimony, in their estimate of the credibility of the impeached witnesses: *Held*, that this charge is not erroneous.

[2.] A motion to amend, made after "a case has gone to the Jury," ought, on payment of costs by the movant, to be allowed, unless the party opposing the motion "will state on oath," or his Attorney at Law will "state in his place," that such party will be "taken by surprise," and will be "less prepared for trial in consequence of the amendment" if allowed.

Taylor and Taylor vs. Smith.

Slander, in Twiggs Superior Court. Motion for a new trial. Decided by Judge HARDEMAN, September Term, 1853.

Benjamin B. Smith brought his action of slander in Twiggs Superior Court, against Samuel Taylor and wife, returnable to the September Term, 1850, for words spoken by the latter.

The declaration charges that the words were spoken on the first day of May, 1850, and were as follows: "that plaintiff kept Mrs. Louisa P. Lynch and gave her the c**p."

The defendants filed the plea of the general issue.

The cause was carried to the appeal by consent, and continued once thereafter by the defendants.

On the trial, the plaintiff proved the speaking of the words, on the evening of the 26th day of December, 1849, by two witnesses, Mrs. and Miss Melton. It also appeared in evidence, from the testimony of the Clerk, that the declaration was filed in Court *some* two or three weeks before the process bears date.

The defendants then read in evidence the evidence of Mrs. Vann, taken by interrogatories, going to impeach the character of Mrs. and Miss Melton for "truth and veracity." Plaintiff sustained character of witnesses. Defendants, at this point, moved to amend their defence, by filing the plea of Statute of Limitations. The Court refused the motion. The defendants then swore James Taylor, (son of defendants) who testified that he was present at his father's, when Mrs. and Miss Melton were there at supper on the 23d or 24th of December, 1849; he never saw them there on an evening afterwards—he heard no conversation in his presence about Mr. Smith."

The cause was then submitted to the Jury, and the Court, among other things, charged "that the fact that one has lived a long time in the neighborhood, and is well acquainted with the person whose good faith is sought to be assailed, and has never heard their truth questioned, is evidence which the Jury may weigh in their estimate of credibility."

The Jury found a verdict in favor of plaintiff for \$2,750.

Whereupon, Counsel for defendants moved the Court for a new trial, on the grounds—

Taylor and Taylor vs. Smith.

1st. Because the Court erred in charging the Jury as above set forth.

2d. Because, from the exorbitant amount of the damages, the Court must conclude that the Jury acted from passion, partiality or mistake.

3d. Because the Jury found contrary to law and evidence.

4th. Because the Court erred in not allowing the defendants to file the plea of the Statute of Limitations.

The Court (Judge HARDEMAN presiding) over-ruled the motion for a new trial, and Counsel for defendants excepted.

COLE & POE for plaintiffs in error.

WHITTLE and I. L. HARRIS for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

A witness of the defendant's swore of two witnesses that had been examined by the plaintiff, as follows: "From the knowledge I have of their character in the neighborhood, for truth and veracity, I should weigh their evidence, in a Court of Justice, with a considerable degree of allowance."

This testimony says, in effect, that the two witnesses bore in their neighborhood, a reputation for truth which was not good.

To rebut it, the plaintiff examined two witnesses, who swore that they were acquainted with the character of the two impeached witnesses, for truth, in the neighborhood in which those witnesses lived, and that from their knowledge thus derived, they would believe those two witnesses on their oath, in a Court of Justice: but these two supporting witnesses also swore that they had never heard any thing for or against the truth of the two impeached witnesses—that they had never heard the question of such truth raised among their neighbors.

The effect of this testimony was certainly, to some extent, to rebut the testimony of the impeaching witnesses. It says at least as much as this: that if the character of the impeached witnesses was not good, they, the supporting witnesses, had

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never heard that it was not; and if it were true that it was not, they were such persons as would probably have heard of it: for they swear that they are acquainted with that character, although they never heard it spoken of; meaning, perhaps, to have it understood that they derive that acquaintance from the sort of respect and consideration with which those witnesses were treated by their neighbors.

And certainly the sort of silent respect and consideration with which one is treated and received by those who know him, is some index of what they think of him as a man of veracity. And, indeed, if he is a person whom they think very highly of, this is about the only index. The character for truth, of such a person, is never discussed—questioned—“spoken of.” To discuss, question, or even, perhaps, to speak of one’s reputation for truth, is to admit that two opinions are possible on the point. Suppose the question were, what was the character of Washington, among his neighbors for truth, could the answer be any thing but this? I never heard it questioned, discussed, spoken of; and yet, I know it to have been the most exalted.

This testimony, then, for the purpose of rebuttal, if for no other purpose, was well received. And whatever rebuts impeaching testimony, may, of course, be weighed by the Jury, in estimating the credibility of the impeached testimony.

[1.] The charge which is assigned as erroneous, was in substance, no more than that the Jury might weigh the testimony for such a purpose; and was, therefore, in the opinion of this Court, not erroneous.

After the defendants had delivered evidence to the Jury, they moved to amend their answer, by adding a plea of the Statute of Limitations. The Court over-ruled the motion, “because (in the language of the Court) no cause is shown in excuse of its not being filed before—the testimony on which it is sought to be placed, having been in Court for a long while, as seen from entries on interrogatories.” There is no other reason assigned for the decision. It does not appear that any other existed. Therefore, it does not appear that the plaintiff stated “on oath,” or that his Attorney “stated in his place,”

that he would be "taken by surprise," and would be "less prepared for trial in consequence of the amendment," should the amendment be allowed. For aught that appears to the contrary, the plaintiff, at the time when the motion to file the new plea was made, was as ready to meet that plea as he would or could have been, had the plea been filed at the earliest moment at which it could be filed. And, therefore, for aught that appears to the contrary, the filing of the plea (if it had been filed) at that late time, would have done the plaintiff no more harm than would have the filing of it at the earliest possible time. This being so, every reason that exists for allowing the plea to have been pleaded at the earliest time, exists for allowing it to have been pleaded at the late—unless there is some positive command of the law, which prescribes the one time rather than the other.

Is there any such a command? That, therefore, is the question.

The fifth Common Law Rule of Court is as follows: "When an appeal is entered, either of the parties litigant may make any amendment of the declaration or answer they may deem necessary. The party amending, shall give notice thereof in writing, accompanied by a copy of the amendment to the adverse party, three months previous to the next term after the appeal; and if the party amending fail to give such notice, and the adverse party will state on oath, or the Attorney at Law state in his place, that he is taken by surprise, and is less prepared for trial, in consequence of the amendment, the cause shall be continued at the instance of the amending party."

By this rule, a defendant may amend his answer on the appeal, at any stage of the case before verdict, subject to the contingency of having a continuance charged against him, if he so does. A license so broad as this, is manifestly capable of abuse to the injury of plaintiffs; to the delay of Court business; and to the infliction of unnecessary labor upon Court and Jury.

To prevent such abuse, probably another rule was adopted—the fifty-third. That, among others, contains the following words: "Exceptions to the declaration or answer shall be tak-

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en before the case is submitted to the Jury, either at Common Law or on the appeal—and in no case shall the declaration or answer be amended in matters of substance, after the case has gone to the Jury, except at the discretion of the Court, and upon payment of costs."

By this rule, after a case has gone to the Jury, whether either side of it can be amended or not, on payment of costs, is committed to the discretion of the Court. But even when discretionary power is given, the intention, it may be assumed is, that the power is at some time to be exercised. And what better time can be assumed, as one intended, than a time at which the exercise of the power will create no surprise—produce no delay, expense, vexation—do no legal harm to the one side, while it will or may do legal good to the other.

If this be so, then the time when the defendant in this case applied for leave to amend his answer, was a time at which the discretionary power of the Court to allow the amendment, should have been exercised. For it does not appear that the amendment, if made, would have surprised the plaintiff, or done him other legal harm, while it does appear that it might have done the defendant some good, as he had testimony which the Jury might have considered supportive of the plea.

[2.] So we think the amendment should have been allowed.

My own opinion is, that not only should it have been allowed under these two rules of Court, but also that it should have been, under the Act of 1818, (*Pr. Dig.* 442) of which the first section is as follows: "That in every case where there is a good and legal cause of action plainly and distinctly set forth in the petition, and there is in substance a copy served on the defendant or defendants, or left at their most notorious place of abode, every other objection shall be, on motion, amended without delay or additional costs." I understand this Act to apply to the defendant's side of a case, as well as to the plaintiffs. The words "every other objection" is broad enough for that—and the preamble shows the defendant's side of the case to have been in the mind of the Legislator equally with the plaintiff's. These words are, in the preamble, "*Parties, Clerks*

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and Sheriffs." Not only the omissions of both parties, but those also of "Clerks and Sheriffs" were in the mind of the Legislator, and were equally provided for in the body of the Act.

No. 3.—TERRELL BARKSDALE, plaintiff in error, vs. WILLIAM A. COBB, Ordinary of Upson county, defendant in error.

[1.] The mere fact that the securities reside in a different county from the one in which the application is made, is not, of itself, a sufficient reason for refusing administration.

[2.] The refusal, by the Ordinary, to grant letters of administration, *pendente lite*, is a Judicial Act; and to reverse it, appeal, and not mandamus, is the proper remedy.

Mandamus, in Upson Superior Court. Decision by Judge STARKE, at Chambers, February 22d, 1854.

The petition for mandamus set forth that Mrs. Macharine Bunckley departed this life in Upson county, in the year 1850. That a paper purporting to be the will of Mrs. Bunckley had been propounded for probate in the Court of Ordinary of said County, to which a caveat had been filed, and that the issue made thereon was now pending on the appeal in Upson Superior Court. That the petitioner made application to William A. Cobb, Ordinary of Upson county on the 17th day of August, 1853, for letters of administration *ad callem gendum, pendente lite*, on the estate of Mrs. Bunckley; that the said Ordinary, Wm. A. Cobb, refused to grant the said letters, and prayed the Court to enjoin and require the said Ordinary to grant the said letters of administration to the petitioner.

In his answer, the Ordinary admitted the facts charged, and set forth the ground upon which he refused to grant the letters,

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to wit: "Because the securities offered, reside out of the county of Upson, and no security is offered who resides in said County."

The securities offered, all lived in the county of Talbot, adjoining the county of Upson.

The Ordinary also demurred to the mandamus, on the ground that from his decision, refusing to grant the letters of administration, an appeal would lie.

At the hearing, Judge STARKER refused to grant the mandamus, and counsel for petitioner excepted.

L. B. SMITH for plaintiff in error.

O. GIBSON for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Two questions only are made in this record. 1st. Was the Ordinary of Upson right in refusing to grant temporary letters, on the ground that the securities, although ample, resided, all of them, in the neighboring county of Talbot? 2d. Was mandamus the proper remedy?

[1.] Upon the first ground, we are not prepared to sustain the Ordinary. We think that the bare fact that the securities reside in a different county from the one in which the application is made, is not of itself, a sufficient reason for refusing administration, either temporary or permanent.

We would not be understood as holding, that in every instance, and under all circumstances, the Ordinary should be compelled to accept securities residing out of the County, provided they were solvent. Their residence might be so remote as to justify him in withholding letters. For we are not unmindful of the necessity and importance of enabling that officer, as well as the heirs, of maintaining a proper supervision and control over the circumstances and condition of the parties. No such reason as that, however, exists, or is pretended to exist in the present instance.

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[2.] Was mandamus against the Ordinary, the proper remedy?

Under the old Law, and before the re-organization of the Court of Ordinary, a distinction was made between letters which were granted to collect and take care of the estate until a permanent appointment was made, and letters *pendente lite*. The former, under the Act of 1799, were granted by the Clerk merely, without the action of the Court—the latter, by the Court itself. And we do not see that the alteration in the Constitution has abolished this distinction.

Now, when permanent letters are applied for, the Ordinary, acting as Clerk merely, and in vacation, may grant temporary letters *ad collegendum bona defniti*. But if letters *pendente lite* are granted, it must be by the Ordinary, acting in his Judicial character. His refusal, in the present instance, was by him, sitting as a Court. It was the judgment of the Ordinary. And the new Law, as well as the old, provides, that from every such decision *an appeal* lies to the Superior Court. And that, we think, was not only the appropriate, but the only remedy in the case. Having this specific redress provided by Statute, mandamus will not lie.

And such, we believe, has been the universal construction put upon the late Law. Nor is it true, in point of fact, that the proceeding, by appeal, would be productive of either more delay or expense than a resort to a mandamus. Indeed, in both of these respects, the appeal, we apprehend, has the advantage. But whether this be so or not, it being allowed by Law, mandamus will not lie. And on this ground, the judgment below is affirmed.

Phillips, guar. *vs.* Chappell *et al.* adm'rs.

No. 4.—JAMES S. PHILLIPS, guardian of James S. Phillips, plaintiff in error, *vs.* GABRIEL H. CHAPPELL and THOMAS BENSON, administrators of James Hopkins, deceased, defendant in error.

[1.] A father makes to his daughter an instrument in writing, which, without the doing of any violence to the words of it, may import an advancement of so much of her portion, or a gift over and above that portion: *Held*, that although the legal presumption from the face of the instrument may be that he intended an advancement, yet, that such presumption may, at least in Equity, be rebutted and rebutted by parol evidence, showing the intention to have been such a gift.

[2.] A father, after conveyance in writing, of slaves made to his daughter, makes verbal admissions, tending to show that by the conveyance he did not design an advancement of so much portion, but a gift or settlement beyond such portion: *Held*, that these admissions are evidence against a son claiming as heir.

[3.] Admissions of a deceased person, tending to show that an instrument of writing made by him, was founded on a valuable consideration, cannot have the effect to set up the instrument as a will.

In Equity, in Meriwether Superior Court. Tried before Judge STARKE, February Term, 1854.

This was a bill in Equity, filed by the defendant in error against the plaintiffs in error, as administrators on the estate of James Hopkins, deceased, for his ward's distributive share of said estate.

In their answer, the defendants alleged that their intestate, while in life, executed a deed of gift for two negroes, to-wit: Mary and her child Robert, to his daughter Amelia, who subsequently intermarried with Thomas Benson, one of the defendants. That under and by advice of Counsel, in course of administration of said estate, they treated the said negroes, Mary and Robert, as an advancement; and in distributing said estate, they had included said negroes as a part of the same, and had given their note for the complainant's share, in said notes to complainants. They alleged that the said negroes ought not to have been treated as an advancement, but insisted

that they were an independent gift by James Hopkins, to his daughter Amelia Hopkins, now Amelia Benson, and prayed the Court that the note given to complainant, for his share of said negroes, be cancelled.

On the trial, the defendants read in evidence the following paper :

"GEORGIA—WILKES COUNTY:

Know all men by these presents, that I, James Hopkins, of the county and State aforesaid, for and in consideration of the love and affection which I have and bear to my daughter Amelia Hopkins, I give to my said daughter the following negro slaves, viz: a negro woman named Mary, about eighteen or nineteen years of age, and her child Robert, near two years old, and all the future increase of said negro woman Mary: nevertheless, reserving to myself my life-estate in the said negroes. All of which I hereby warrant and forever defend against me and my heirs, and all persons whatever, on the condition above stated. To have and to hold the said negroes and their increase, as above mentioned, after the termination or dissolution of my life. In witness whereof I have hereunto set my hand and seal, this 18th day of March, 1824.

JAMES HOPKINS.

Signed and acknowledged in presence of John Dyson", and regularly recorded.

Defendants then proposed to prove, by Abijah Smith and others, the declarations of James Hopkins, made after the execution of the instrument, and after the negroes had gone into the possession of Benson, in substance, as follows: "that after the death of his (Hopkins') first wife, the mother of Permelia, there was a contest between Mr. Rodes, the father of Hopkins' first wife and Hopkins, as to whether the negroes mentioned in said deed of gift, had been loaned or given to Mrs. Hopkins, and that Rodes claimed the right to give the slaves to his granddaughter, Permelia Benson, and the matter was adjusted be-

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twen them by Hopkins agreeing to convey the property to his daughter Permelia ; and the deed of gift was made in pursuance of that adjustment”.

The defendants also proposed to prove by the same witness, “that in 1843 Benson applied to James Hopkins to borrow money, and Hopkins refused to loan him the money, except at 16 per cent. ; and said that Benson and his wife should never have any other or further advantage over his other children, than they had already acquired in the receipt of the said negroes. He would not let him have the money, except at 16 per cent. as he had already given him the negroes mentioned in the deed, over and above the rest”.

The Court excluded the testimony offered, on the grounds—

1. Because parol evidence is inadmissible to explain, add to or vary the deed of gift.

2. Because the proposed admissions are from a party, who had previously parted with both the possession, as well as all interest in the slaves, and were not contemporaneous with the gift nor a part of the “*res gestæ*”.

3. Because the effect of the admissions would be to set up a will for the intestate, by parol.

To which decision and ruling of the Court, Counsel for defendants excepted.

DOUGHERTY, for plaintiff in error.

J. L. STEPHENS, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Whether the intention of James Hopkins was to give the negroes to his daughter Amelia, as an advancement of so much of her portion in his estate, or as a present over and above that portion, or even as something in compromise of a claim which she set up against him, the instrument which he made to her, without the necessity of having to do much if any violence to the words of it, is capable of subserving that intention. The rela-

tionship of parent and child being considered, the intention is doubtless to be presumed, as long as there is nothing but the face of the instrument to go by, to have been an advancement. *Ellison vs. Cookson*, (1 Ves. Jr. 108.) But this presumption is one which, at least in Equity, is liable to be rebutted, and rebutted by parol evidence; such, for example, as shall show the intention to have been either of the other two mentioned things. In support of this proposition, numerous cases may be found cited in 2 Stark. Ev. 569, and in note 1003 to Phil. Ev. with Cowen & Hill's Notes.

[1.] The Court below, therefore, in rejecting the evidence because it was parol evidence, erred.

At the time when James Hopkins made the admissions, he had, it may be true, parted with the "possession" of the negroes; but if it be true that he had also parted with "all interest" in them, how comes it that his son, the defendant in error, can say that they are any part of the father's estate, and claim them by inheritance? The nature of the son's claim, is such as to make it indispensable for him to concede that the father, at the time of making the admissions, had not parted with all interest in the negroes.

This being so, the admissions of the father bound the father, as they were against his interest; and what binds the ancestor binds the heir. *Smith vs. Smith*, (3 Bing. N. C.) And see *Dartmouth vs. Roberts*, (16 East. 344.) *Ivat vs. Finch*, (1 Taunt. 141.)

[2.] The Court below, therefore, in holding that Hopkins, the ancestor, at the time of making the admissions, had parted with all interest in the slaves, in such a sort that his admissions could not bind his heir, erred.

The effect of admitting the evidence, it is conceived, would have been, not to "set up a will"—not to make out the instrument to be a will, but to make it out to be a deed—a conveyance on a valuable consideration—the compromise of a claim—a conveyance, therefore, irrevocable—a conveyance conveying a right in the present—a possession in the future.

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Therefore, as it appears to us, the Court below was wrong in holding that the effect of the evidence, if admitted, would be to set up a will by parol.

No. 5.—MARTHA BOOTH, plaintiff in error, vs. RICHMOND TERRELL, defendant in error.

- [1.] The term *lend*, when used in a will, is generally equivalent to *gift*.
- [2.] When the will shows that the testator did not intend the legal estate to pass to the legatee, then the word *lend* has its appropriate meaning.
- [3.] A loan implies that the use of a thing, is granted with for a limited time and for a special purpose—the right of property remaining in the lender. An estate, therefore, which can never revert, cannot be a loan.
- [4.] A remainder is the remnant of an estate, limited to arise immediately on the determination of a precedent particular estate; and it always creates a new estate in the remainder-man.
- [5.] It has never been decided by this Court, that a *reversion* in personal property could not exist by parol.
- [6.] A reversion is the return of an estate to the grantor and his heirs, after the grant is over; a gratuitous permission, by the owner to a third person, to use the chattel for a specified time, the proprietary interest still continuing in the owner, is not a *reversion*.
- [7.] A loan is the bailment of an article for a certain time, to be used by the borrower without paying for its use.
- [8.] The borrower is bound to take good care of the thing borrowed; to use it according to the intention of the lender; to restore it at the proper time, and to restore it in a proper condition.
- [9.] The borrower must return the increments or offspring of the thing lent.
- [10.] A loan being strictly gratuitous, the lender may terminate it whenever he pleases.
- [11.] The thing loaned is to be restored to the lender, unless it has been agreed that the restitution shall be to some other person. If the lender be dead, it is to be restored to his personal representative, if known.
- [12.] During the loan, nothing passes to the borrower but a mere right of possession and user of the thing during the bailment.
- [13.] An action of trespass or trover, will lie in favor of the lender, against

a stranger who has obtained a wrongful possession or has made a wrongful conversion of the thing loaned.

Trover, in Newton Superior Court. Tried before Judge STARKE, March Term, 1854.

This was an action of trover brought by John P. Booth and his wife, Martha Booth, against Richmond Terrell, for the recovery of eight negro slaves, to-wit: Letty and seven children, named in the declaration. Pending the action John P. Booth died, and the same proceeded in the name of the wife.

The defendant pleaded the general issue and the Statute of Limitations.

On the trial, plaintiff proved by two witnesses, that in the year 1820, in Jefferson county, Richard Hodges, the father of Mrs. Booth, loaned Letty, the negro woman sued for, to Richmond Terrell and his wife, for and during the life-time of the latter, with the understanding, that at the death of Mrs. Terrell, the said girl Letty should be returned to his daughter, Martha Hodges, the plaintiff in the action.

Plaintiff also read in evidence the will of Richard Hodges, the 2d item of which read as follows: "I give and bequeath to my daughter, Martha Hodges, eleven negroes, named as follows: Mary and her four children, (naming them and others,) and Letty; the last named in the possession of Mrs. Terrell, and to remain so during Mrs. Terrell's natural life; then to become the property of my daughter, Martha Hodges". The plaintiff also proved the death of Mrs. Terrell, the conversion and value of the negroes and closed.

The defendant introduced testimony, which it is unnecessary to set out here.

The Court charged the Jury, "that a loan of a slave by one person to another, for the life of the person to whom the property was loaned, or for the life of his wife, by a parol agreement that the slave should be returned to the owner or his heirs, at the death of such person, vested an absolute title to the slave, in the person to whom it was loaned. And if the

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Jury believed that Richard Hodges was the owner of the negro girl Letty, and that he loaned her to the defendant or his wife upon a parol contract, that she was to be returned to him or his heirs, after the death of defendant's wife, that the defendant thereby acquired an absolute fee simple title to the negro, and the plaintiff could not recover; but the Jury ought to find a verdict for the defendant".

To which charge of the Court, Counsel for plaintiff excepted and has brought up the same for review.

EZZARD & W. W. CLARK, for plaintiff in error.

FLOYD, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

This is an action of trover by Martha Booth against Richmond Terrell, for eight negroes. The plaintiff relies on the following title, namely: that her father, Richard Hodges, intermarried with Louisa Terrell, the daughter of the defendant; and by said marriage, acquired the title to Letty, who, together with her children, constitute the property in dispute. That Mrs. Hodges died some short time after her intermarriage with plaintiff's father; and that thereupon, Richmond Hodges loaned to his mother-in-law, Mrs. Terrell, wife of the defendant, and at her special request, and by the consent and approval of the defendant, the girl Letty, to be held and enjoyed by her as a loan, during her life-time; and at her death, one of the witnesses swears, the negro was to be returned to plaintiff, who is the daughter of Richard Hodges by a former wife. The other witness testifies to the same contract, in substance, except that he states the girl was to be returned to Richard Hodges or his heirs. Richard Hodges died in 1824; and by his will, bequeathed Letty to his daughter, the plaintiff in this action.

The Court charged the Jury that the loan of a slave by one person to another, for the life of the borrower, by a parol agreement that the slave should be returned to the lender or his

heirs, at the death of the borrower, vested an absolute title to the slave in the borrower.

This charge is excepted to, and the only question to be determined is, did the Court submit the Law of the case correctly, upon the facts proven?

Counsel for the defendant below and in error, insist that the charge of the Court is sustained by the decision of this Court in *Bryan vs. Duncan* (11 Ga. R. 67.) And also by the doctrine ruled first by this Court in *Kirkpatrick vs. Davidson* (2 Kelly's R. 301,) and repeatedly recognized since, that a remainder in slaves cannot be created by parol.

[1.] The point decided in *Bryan vs. Duncan* was, that in a will, the word *lend* was sometimes construed to be equivalent to *give*. And in support of this principle, *Hinson and Wife vs. Pickett and Myers, adm'r, vs. Pickett* (1 Hill's Ch. R. 85,) was relied on.

[2.] But what was the reason given in both of these cases, for holding that in those wills the word *lend* meant *gift*? It was because "the testator evinced a clear intention to part with the entire dominion over the party bequeathed. After his death, the property never could have reverted to his executors. A final disposition of it is made by the testator". Such is the language of this Court in *Bryan vs. Duncan*.

And in the case in *Hill*, Judge O'NEALL says: "the term *lend*, when used in a bequest, is generally equivalent to *give*. In some special cases, it has its appropriate meaning: as in *Baker vs. Baker & Red*, decided by this Court in December, 1831. But in such cases, there is something which shows that the testator did not intend the legal estate to pass to the legatee. In the will under consideration, the testator has not manifested any such intention; he uses the word to pass from him the entire property in the chattel; and it is worthy of remark, that he uses the word, (*lend*) not in relation to the life-estate, which he had created, as he supposed, for his daughter, but also to the absolute estate in remainder, which he also supposed he had created in favor of her children.

[3.] The testator parts with the entire dominion in the prop-

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erty; and it is absurd to say, that an estate which can never revert, can be a loan, which implies that *the use* of the thing is parted with for a *limited time*, or for a special purpose, and the right of property remains in the lender. It is therefore clear, that the word *lend*, in *this will*, must be considered as synonymous with *give*".

The cause of the defendant cannot derive much aid from these precedents. First, this is not a *will*, but a *gift, inter vivos*; and secondly, so far from the lender's manifesting any intention to part with the title to this property, it is stipulated, expressly, that it shall be returned to him or his heirs, at the death of Mrs. Terrell.

[4.] Is this an attempt by Richard Hodges, to create, by parol, a *remainder*, in personal property? What is a remainder? The remnant of an estate, limited to arise immediately on the determination of a precedent particular estate. Read the testimony of Sarah Smith and George C. Hodges, and I am quite sure that it never would occur to any legal mind that Richard Hodges, by the loan which he made of Letty to Mrs. Terrell, for life, intended to create a *new estate* in this negro, in himself, at the death of his mother-in-law. And this he would do, in legal contemplation, provided it were a remainder. One of the rules regulating remainders is, that they must pass out of the grantor, at the time the particular estate is created. And yet, Mr. Terrell, the defendant, declared, at the time that Hodges parted with the girl, that he had no claim on her, and that his wife only wanted her as a loan; and that he would return her at the old lady's death.

[5.] It has never been decided by this Court, that a *reversion*, in personal property, could not be created by parol; although, from the use of that word, in the first opinion delivered upon this subject, (*Kirkpatrick vs. Davidson*, p. 302,) *incautiously perhaps*, it may be inferred that the Judge who wrote it out, supposed, at the time, that the rule applied to *reversions* as well as *remainders*. Be this as it may, we are clear that this is neither a remainder or reversion.

[6.] We have attempted to show that this is no remainder.

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Is it technically a *reversion*? What is a reversion? It is the return of an estate to the grantor and his heirs, after the grant is over. But here no estate, as we shall presently see, ever was granted; but a mere gratuitous permission to Mrs. Terrell to use the servant for a specified time—Hodges still continuing to be the owner of the slave, to all intents and purposes.

[7.] This, then, is neither more nor less than a loan—a contract of every-day occurrence, especially between fathers-in-law and sons-in-law. In this particular instance, however, owing to the peculiar circumstances of the case, the relative position of the parties to the transaction, happens to be reversed. The son-in-law is the lender, and the father-in-law, or his wife, the borrower.

Chancellor *Kent* defines a loan to be a bailment of an article for a certain time, to be used by the borrower, without paying for the use. (2 *Kent's Com. Lecture* 40, p. 573, 4th Edition.) And this language is copied, almost *verbatim*, from Sir *William Jones*. See *Treatise on Bailments*, pp. 118, 217. *Ayliffe* says, “it is a grant of something, made in a gratuitous manner, for some certain use and for a certain term of time, expressed or implied, to the end that the same species should be again returned or restored again to us; and not another species of the same kind or nature, and this in as good plight as it was delivered”. (*Pandects*, B. 4, tit. 16, p. 516.)

[8.] The obligation of the borrower is, to take proper care of the thing borrowed—to use it according to the intention of the lender—to restore it at the proper time, and to restore it in a proper condition. (*Story on Bailments*, §§232, 254, 255.)

[9.] Not only is the borrower to make a return of the thing, at the time, and in the place, and in the manner contemplated by the contract, but he must make a like return of all the increments and offspring of the thing lent. (*Ib.* §257.)

[10.] The continuance of the loan rests upon the good pleasure and good faith of the lender, and is therefore strictly precarious. A loan being strictly gratuitous, the lender may terminate it whenever he pleases. (*Story on Bail.* §277. *Viner's*

Ab. Bailment D. Bacon's Abr. Bailment D. 9 Cowen, 687. 9 East. 49. 1 Dane's Ab. Ch. 17, Art. 4, §10. 2 Leon. R. 30, 89. Dyer, 48 b. Cro. Jac. 687. 2 Roll. R. 460. 1 Str. R. 165. Shepherd's Epitome—Countermand.

[11.] The thing loaned is to be restored to the lender, unless it has been agreed that the restitution shall be to some other person. If the lender be dead, it is to be restored to his personal representative, if known. (*Story on Bail. §262.*)

[12.] During the period of the loan, the lender still retains the sole proprietary interest, and nothing passes to the borrower but a mere right of possession and user of the thing, during the continuance of the bailment:

[13.] So that an action for a trespass or conversion, will lie in favor of the lender against a stranger, who has obtained a wrongful possession or has made a wrongful conversion of the thing loaned. (11 *Johns.* 285. 7 *Cowen*, 753. 9 *Ib.* 687. 2 *Saunders, by Williams*, 47, b. *Bacon's Abr. Trespass C. 2. Ib. Trover C. 1 T. R.* 480. 2 *Camp.* 464. 8 *Johns.* 432. 13 *Johns.* 141. 2 *Kent's Com. Lect.* 40, p. 574, 4th Edition.)

The foregoing propositions, fully warranted as they are by adjudicated cases, demonstrate, so clearly, the nature of this transaction, to-wit: that it is neither a *remainder* nor a *reversion*, but a *loan*, for a definite period, with the express understanding, that at the death of Mrs. Terrell, the woman, and of course her offspring, born during the lifetime of Mrs. Terrell, should be returned to Richard Hodges, if living; or if dead, to his daughter Martha, or his heirs: I say, that this so unmistakably, is the legal character of this contract, that we are unwilling to elaborate it further.

I have said that these contracts of gratuitous loans, were subjects of daily occurrence, in the actual business of human life. This record shows that the very defence set up by Richmond Terrell, is founded upon the validity of such contracts. Whether the generous confidence bestowed by either or both of these parties, in the other, has been abused, remains to be seen.

No. 6.—HILLIARD J. PARKER, plaintiff in error, vs. RACHAEL WALDEN, defendant in error.

[1.] Where P brought suit against W. and proved by several witnesses that W lived with him for the time alleged in the petition, and that her board was worth what was charged, and on this testimony relied for recovery; and where a similar number of witnesses proved for the defendant W. that her services, the labor of her two small negro boys, the use by P of her horse, stock, oxen and cart, and the consumption by P's family of a certain amount of pork belonging to her, were, together, worth fully as much as her board; and after said suit brought by P. he wrote a letter to W, asking forgiveness for what had been done, promising that if she would forgive and come back, he would stop the suit; and in the same connection inviting her to come back and *live as she had done before*; and a verdict was rendered for P by the Jury: *Held*, that this Court would not interfere with the discretion of the Circuit Judge in granting a new trial.

Attachment, in Newton Superior Court. Motion for a new trial, in Newton Superior Court. Decided by Judge STARKE, March Term, 1854.

This was an attachment, issued at the instance of the plaintiff in error, against the defendant, on an open account, for board, washing and lodging of the defendant, for five years and eleven months, at \$100 per annum.

The defendant appeared, and pleaded the general issue and set-off, alleging that the plaintiff was indebted to defendant in the sum of \$800 for her own services, and for the service of two negro boys, use of horse, oxen, stock, &c., &c.

On the trial, the plaintiff proved by three witnesses, that the defendant lived with plaintiff during the time alleged, and that her board, lodging, &c. was worth the amount charged.

The defendant then proved by some three or four witnesses, that the services of the defendant, and the labor of the two negro boys, and the use of the cart and oxen, and horse and stock, carried by the defendant with her to the plaintiff's, were worth as much, or more, than the board and lodging, &c. of the defendant. It appeared from the testimony, that plaintiff and defendant bought and used necessaries in common, during the time she lived with him.

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The defendant also proved by John M. Benson "that plaintiff told him (witness) that defendant was to live with him as one of the family, and he never expected to charge her any thing."

The defendant also read in evidence the following letter, written after the commencement of the action."

"GEORGIA, NEWTON COUNTY, July 29th, 1853.

Dear Mother:

I take the opportunity to write to you; we are all well. * * I want you to come back if you can forgive what has been done. If you will come back, I will stop the suit and let it go no further. If you will come and live as you did before, I will treat you as well as I am able. If you had rather leave one of the boys with Milton I am willing—if you had rather bring them here and hire them out, I am willing. I do not want the boys work, without you had rather keep them at home—all I want is peace and friendship. I am truly sorry for what has past. I beg you to forgive me. * * * If you will not comply with none of these propositions, you must do as you please, and I will do as I can. * * *

H. J. PARKER."

The Jury found a verdict for the plaintiff for \$453. Whereupon, Counsel for the defendant moved the Court for a new trial, upon the grounds—

1st. Because the Jury found contrary to Law and the charge of the Court.

2d. Because the Jury found contrary to evidence.

3d. Because the verdict is contrary to and against the evidence, and without any evidence to support it.

The Court sustained the motion, and awarded a new trial; and Counsel for plaintiffs excepted.

W. W. CLARK, for plaintiff in error.

FLOYD, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] By three witnesses, the plaintiff in the Court below proved that the defendant lived with him during the time alleged, and that her board, &c. was worth the amount charged. An implied promise to pay was thus raised; and on this he relied for a recovery. By a similar number of witnesses, the defendant proved that her services, and the labor of her two little negro boys; the use of her horse, cart, oxen, stock, &c., by the plaintiff, were worth fully as much as her board. And so far, if the witnesses are equally credible, the testimony would seem very much balanced.

John M. Benson was then introduced by the defendant, and his testimony seems, if credible, to authorize a strong presumption that the defendant was not to pay the plaintiff for her board, inasmuch as the latter said to the witness that he did not expect to charge her. But it was insisted that the testimony of Benson should be received with suspicion, because of his bias—he himself acknowledging that he was unfriendly to the plaintiff.

Let this be conceded, and yet the following considerations and circumstances cause the scales of evidence to preponderate against the plaintiff:

1. The defendant went to the plaintiff's house with her stock, cart, provisions, furniture and little negroes; the pork she carried with her was consumed by the family of plaintiff; her stock used by them; her oxen and cart employed by him paying for the rent of plaintiff's homestead; and the services of herself (who, though aged, is described as of "unsurpassed industry, and almost always at work, carding, washing, &c.") rendered about the premises. All of which seems to show, that the parties made a sort of common account in house-keeping.

2. In the letter of plaintiff, which was in evidence, we find him saying, "if you can forgive what has been done; if you will come back I will stop the suit," &c.

What was it she was asked to forgive? What the wrong

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which had been done, and which needed forgiveness? The context furnishes the answer, and shows that that *wrong* was the claim, by suit, of payment for defendant's board: for this is the injury which he promises to redress, if she will forgive and come back. He adds, that he would let the suit go no further, if she would come *and live as she did before*. And this, under the circumstances, seems an additional confirmation of the opinion, that the defendant was before living with him in a way that made a charge for board improper and unjust.

Again: the plaintiff repeats, that he "is truly sorry for what has passed," and begs to be forgiven.

These considerations, in our opinion, might very properly have influenced the Court below to hold, that there was a considerable preponderance of testimony in favor of the defendant; and accordingly, in view of the act of the last Legislature, to have granted a new trial. Especially do they render it proper that we should not control the discretion of the Circuit Judge, who had the witnesses before him, and being more of the vicinage, as it were, could better judge than we of their characters, and the value of their testimony. It has been often said, that for such reasons as those last specified, a reviewing Court should be ever cautious in controlling the Circuit Judge who grants a new trial.

We take occasion to add, that we do not regard the letter of the plaintiff, to which we have referred, as improperly admitted, because written by way of a compromise, as was insisted in the argument. It does not bear the character of an instrument by which the plaintiff was endeavoring to buy his peace. It has the impress, indeed, of a just and christian frame of mind, desirous "of peace and friendship," as the plaintiff expresses it; and its whole tenor is creditable to its writer: but it was no offer of compromise, in the legal sense of the term, and was properly admitted as evidence.

Judgment affirmed.

No. 7.—JOHN SMITH, adm'r, &c. plaintiff in error, vs. MASON GENTRY, defendant in error.

[1.] A Court of Equity will not permit an administrator, who, in 1846, takes out letters on the estate of an intestate who died in 1823 or 1824, without heirs, distributees or creditors, to recover a tract of land from one who purchased the same, and has been, for many years, in peaceable possession thereof.

In Equity, in Fayette Superior Court. Demurrer. Decided by Judge WARNER, March Term, 1854.

Everett Noland drew lot of land No. 48, in the 18th district of originally Henry, now Fayette county. Noland died in 1823 or '24, without heirs, distributees or creditors. Mason Gentry purchased said lot of land, in 1836, from Samuel Smith, taking his bond for titles and paying a part of the purchase-money—Smith being in possession at the time and claiming the land as his own. Gentry went immediately into possession, and has continued so ever since. In 1849, John Smith took out letters of administration on the estate of Noland, in the county of Columbia, and commenced an action of ejectment against Gentry, for said land, returnable to the March Term, 1850, of Fayette Superior Court; and which cause is now pending on the appeal. Gentry filed his bill, alleging the foregoing facts, and prayed the Court that John Smith, administrator of Noland, be perpetually enjoined from prosecuting the said action of ejectment.

• To this bill, the defendant filed a general demurrer, which, after argument had thereon, the Court over-ruled and ordered the defendant to answer. To which decision of the Court, Counsel for defendant excepted.

STONE, for plaintiff.

EZZARD, for defendant.

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By the Court.—STARNES, J. delivering the opinion.

[1.] The complainant in this case, is in the possession of the land specified in the bill, under a claim of right, in good faith asserted, and has been so for many years. His possession, under such circumstances, must prevail until some one shows a better title to the land. Can such title be shown by the defendant, who has administered on the estate of Samuel Smith, (admitting title to be in this estate,) *for the purpose of recovering the land from the complainant, when there are neither heirs, distributees nor creditors of said estate?*

The bill alleges these facts to be true, and the demurrer admits them, of course. If they are true, there would seem to be no equity in permitting such a claim to prevail over the rightful possession of the complainant. What good can come of it? What purposes of justice be subserved by it?

But there is another question, the answer to which is, perhaps, more decisive. If there be neither heirs nor creditors, what title to the property has an administrator?

An administrator "is a person lawfully appointed to manage and settle the estate of a deceased person, who has left no executor". But if there be no settlement to be made, as there can be none, where there are neither heirs nor creditors, in what way can an estate be settled and managed, and how can there be an administrator of it?

If there be neither heirs, distributees nor creditors of an estate, we know that the same escheats, and then the escheator, is the person entitled to take the property into possession. Hence, if a person die without heirs or creditors, there is no need that a trustee, in the character of an administrator, should be appointed for the purpose of taking his estate into possession, inasmuch as the law has already appointed a trustee for that purpose, viz: the escheator. The title to the property, for all purposes of its disposition, in such case, is in that officer, and no other ought, in justice, to recover the same.

It may be said that the Court of Ordinary, a Court of com-

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petent jurisdiction in the premises, has already pronounced upon this subject, by granting letters to the complainant, and its judgment cannot be collaterally impeached. This would be true in a Court of Law; and such is the effect of what this Court says, in the case of *Bryan vs. Walton*, (14 Ga. R. 196.) But it does not follow that a Court, whose high province it is to correct that wherein the Law, by reason of its universality, is deficient, may not interpose to frustrate a proceeding so contrary to Equity, when a case is presented for its consideration like that before us, where a recovery, by the administrator, can in no wise advance justice, or subserve any other purpose than that of putting fees into his pocket.

Whether the complainant be entitled to hold possession of this land or not, as against the escheator, we think a Court of Equity should not permit his possession to be disturbed by one who has no just or equitable right to deprive him of that possession.

Let the judgment be reversed.

No. 8.—WILLIAM W. CARLISLE, plaintiff in error, vs. MIAL M. TIDWELL, administrator of Josiah C. Berry, dec'd.

[1.] A motion is made for a new trial, on the ground of "newly discovered evidence." The mover swears that he was not "apprised of the existence and materiality" of the evidence, until after the finding of the verdict: *Held*, that such an affidavit is not sufficient to support such a motion, especially in a case in which it is far from clear that the evidence, if admitted, ought to make any change in the verdict.

Debt, in Fayette Superior Court. Motion for a new trial. Decided by Judge IRWIN, at Chambers, 9th March, 1854.

This was an action of debt, brought by William W. Carlisle,

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against Mial M. Tidwell, as administrator on the estate of Josiah C. Berry, deceased, on the following note:

\$581 $\frac{56}{100}$.

Twelve months after date, I promise to pay William W. Carlisle, or bearer, Five Hundred and Eighty-one $\frac{56}{100}$ dollars, to bear interest from the 25th day of December last, for value received. Witness my hand and seal, this 10th April, 1841.

JOSIAH C. BERRY, [L. s.]

The action was commenced in 1849. The defendant filed a special plea of payment, alleging that the note had been fully paid off by Berry, in his life-time, to Carlisle, in money, lands and negroes.

On the trial, in support of his plea of payment, defendant introduced Thomas Berry, who testified, "that after the death of Josiah C. Berry, in the State of Alabama, at the April Term of Chambers Superior Court, in the year 1843, witness was arrested for debt, and confined in jail; that he was released, upon the ground that he would turn over property to discharge the debts against the witness and Josiah C. Berry; that there was some \$1500 in judgments and suit against them, and other debts beside; that witness turned over five negroes, which sold for upwards of \$1500; a tract of land which sold for \$340; that he gave up a settlement of land, for which he contracted to pay \$2000, (and had paid \$800) in discharge of the original debt. That when he was under arrest, plaintiff made an examination of the dockets and otherwise, and reported that the property turned over, would pay all the debts, &c. That Carlisle, the plaintiff, told witness frequently afterwards, that he had no claims against the estate of Josiah C. Berry. That all the debts against witness and Josiah C. Berry were raked up in 1843, and property turned over sufficient to satisfy and discharge them, and they were discharged and paid off by the delivery of said property."

The defendant read in evidence a notice from Carlisle to Matthew Turner, administrator of Josiah C. Berry, in the State-

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of Alabama, dated January, 1844, in which he notified "Turner that he held sixteen judgments for forty dollars each, and one for sixteen dollars and sixty cents, in favor of Drea^d E. Pace, for the use, &c. against Thomas and Josiah C. Berry; also a fi. fa. from the Circuit Court of Chambers County, in favor of Wm. Thaxton against Josiah C. Berry, and himself as security, for \$106; also judgment in favor of C. G. Hudson for \$240 85; also a note for forty-five dollars, due in 1841 against the said Josiah C. Berry."

The Jury found a verdict for the defendant: whereupon, Counsel for the plaintiff moved the Court for a new trial, upon the grounds—

1st. Because the Jury found contrary to evidence.

2d. Because the Jury found contrary to Law.

3d. Because, since the trial of the cause, the plaintiff has discovered evidence by which he can prove that the sale of the five negroes and the lot of land testified to by the witness, Thomas Berry, did not pay off all the judgments and executions, and the note sued on.

The newly discovered evidence, relied upon and produced, was, 1st. An exemplification from the records of the Circuit Court of Chambers county, Alabama, containing a judgment and execution in favor of Cuthbert G. Hudson, against the said Thomas Berry, at the April Term, 1842 of said Court— from which exemplification it appeared that said *fi. fa.* to the amount of \$221, was, on the 5th day of September, 1842, transferred by said Hudson to Carlisle, and which was still open and unsettled. 2d. The affidavit of Alexander G. Murray, of Griffin, Ga. setting forth that on the 25th day of March, 1843, he and his partner in the practice of the Law, received from Jas. E. Reese, for collection, a note for \$233 28, made by Thomas and Josiah C. Berry, on the 27th January, 1841, and due 25th December ensuing; that Tidwell had admitted the justness of said note, and had promised to pay it; that Thomas Berry had also admitted to witness that said note was just and owing." 3d. The testimony of one Leroy Driver of Chambers County, Alabama, as taken by interrogatories in another case

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against said Tidwell as administrator, in the Superior Court of Fayette county, and of file in said Court, in substance, "that he, the said Driver, was cognizant of the application of the money arising from the sale of the five negroes, testified about by Thomas Berry.

In support of his application, the plaintiff, Wm. W. Carlisle, submitted his affidavit, verifying the facts set forth, and also stating that he was not "apprized of the existence and materiality" of the said newly discovered evidence, until after the rendition of the verdict.

After argument had on the motion for a new trial, the Court over-ruled the same and refused to grant it, and Counsel for plaintiff excepted.

STONE, for plaintiff in error.

TIDWELL, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The new trial was moved for on three grounds. 1. That the verdict was contrary to evidence. 2d. Contrary to Law. 3d. That the plaintiff had discovered new evidence since the trial.

There is plainly no foundation for the first and second grounds.

[1.] As to the third, the plaintiff's affidavit does not support it—does not say that the evidence which he wishes to use, has been discovered since the trial. What the affidavit says is, that he, the plaintiff, was not "apprized of the existence and materiality" of that evidence, until after the rendition of the verdict. He does not say, that he did not know of the existence of the evidence. And it is to be presumed, that he does not mean so to say, for it is apparent from that evidence itself, that he knew of the existence of much of it. He knew, as appears by the exemplification from the Court in Alabama, of the existence of the *fi. fa.* in favor of Hudson against Thomas

Berry; for the exemplification shows the *fi. fa.* to have been transferred to him, himself, as long before as September, 1842, and his notice to Turner, the administrator of J. C. Berry, dated January, 1844, mentions that *fi. fa.* as one then belonging to him. So, likewise, he knew of the existence of the seventeen *fi. fas.* in favor of Pace, for the use of Simmons against T. Berry and J. C. Berry, and of the existence of the fact that these *fi. fas.* received a part of the money for which the negroes of Thomas Berry were sold: for Driver's interrogatories say, that such part of the money was credited on the *fi. fas.* which, with others, had been levied on the negroes; and his, the plaintiff's same notice to Turner, the administrator, mentions these *fi. fas.* as being also held by him, which notice was in 1844.

This being so, it is necessary so to construe the plaintiff's affidavit, as to make it mean to say, that although he was aware of the *existence* of the evidence, he was not aware of its *materiality*.

But such an affidavit is not sufficient to support a motion for a new trial, made on the ground of evidence, discovered after the trial. For it is the discovery of unknown evidence: not of the *materiality* of known evidence, which can serve as a cause for a new trial.

The affidavit does not even say, that the plaintiff had *forgotten* the existence of the evidence.

And, indeed, if this evidence on a new trial, should one be granted, should be laid before the Jury, it is far from clear that it ought to bring about any change in the verdict—that it ought to do away with the effect of the absence of this large note from the notice, which the plaintiff gave J. C. Berry's administrator, Turner, of the demands which he held against him, as such administrator, and with the effect of his admissions made to Thomas Berry, fortified as each particular is, by such a lapse of time.

So, therefore, this third ground is likewise insufficient to support the motion for a new trial.

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Therefore, the judgment of the Court below ought to be affirmed.

No. 9.—UEL L. WRIGHT, ISAAC SCOTT and others, plaintiffs in error, vs. THE CENTRAL RAIL-ROAD & BANKING COMPANY, defendant in error.

- [1.] When the question is one of diligence, between a bank and its agent, it is not competent for the latter to protect himself, by proving the custom of another bank, in providing its agents with suitable buildings and iron safes, for the purpose of keeping securely the money of the principal.
- [2.] It is competent for an agent, who has been robbed of the money of his principal, to show that banks and other custodians of money, look to their vaults and safes for security, and not the outside fastenings of the building in which it is kept.
- [3.] An agent for hire, without specific instructions, is bound to observe all the precautions ordinarily pursued in relation to the particular business in which he is employed, and according to the usage of the place and the circumstances of the times within which the business is transacted.
- [4.] It is the privilege, though not, necessarily, the duty of the Court to sum up the evidence in conclusion.
- [5.] It is not necessary, in summing up, that any material fact should be stated: still, it is not just to present the proof, prominently, on one side, and omit, entirely, the countervailing evidence on the other.

Debt, in Bibb Superior Court. Tried before Judge POWERS, November Term, 1853.

This was an action of debt, brought by the Central Rail-road and Banking Company, against Uel Wright and others, on the following bond:

“GEORGIA—DEKALB COUNTY:

Know all men by these presents, that we, U. L. Wright, Isaac

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Scott, James D. Carhart, William B. Carhart, James T. Doane, James Robinson, Terrence Doonan, Joseph Thompson and William B. Davis, are held and firmly bound unto the Central Rail-road & Banking Company of Georgia, in the full sum of Ten Thousand Dollars, to be paid to the said Company or its assigns; for which payment we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals and signed with our hands, this 22d day of November, 1850. Whereas, the above bound U. L. Wright has been appointed to the office of agent of the said, the Central Rail-road & Banking Company of Georgia, at Atlanta. Now, the condition of the above bond or obligation is such, that if the said U. L. Wright shall well and truly execute, and faithfully discharge the duties required of him in said office, and all other duties required of him in the business of the said, The Central Rail-road and Banking Company of Georgia, and in all things shall well and faithfully behave and conduct himself and discharge the trust reposed in him, then this obligation to be void."

U. L. WRIGHT, [L. S.]

ISAAC SCOTT, [L. S.]

JAMES D. CARHART, [L. S.]

WILLIAM B. CARHART, [L. S.]

JAMES T. DOANE, [L. S.]

JAMES ROBINSON, [L. S.]

TERRENCE DOONAN, [L. S.]

JOSEPH THOMPSON, [L. S.]

WM. B. DAVIS, [L. S.]

The declaration alleged "that on the 16th day of March, 1852, there came into the hands of the said Wright, as such agent, the sum of Twenty Thousand Dollars, for which the said Wright had failed and refused to render a true and faithful account, and to pay over the same to the plaintiff."

To this action, the defendants pleaded specially, "that on the 16th day of March, 1852, \$18,121 76 of money of said plaintiff, was, by some unknown person, feloniously and privately stolen, taken and carried away, without the knowledge

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of said U. L. Wright, and without any negligence or carelessness on the part of said Wright, said sum of money, on the day and year aforesaid, having been stolen from a large iron safe situate in the back room of the business house of the said Wright, in the City of Atlanta," &c.

On the trial, plaintiff read in evidence the bond of Wright and his securities, and proved by Richard W. Adams, "that on the 16th day of March, 1852, the amount of money in the hands of Wright, as the agent of plaintiff, was \$16.387 76; which sum he, the said Wright, had never paid over to plaintiff; that Wright received, as a salary for his services, \$50 per month. The principal business of Wright was to discount bills on Savannah, predicated on shipments of cotton and produce, to collect papers, circulate bills, &c. as bank agent," and closed.

The defendant opened his defence, and it appeared in evidence, that the money was kept in an iron safe, situate in the back room of a business house in the City of Atlanta, which was occupied as a bed-room, and in which two persons slept every night. The shutter of one of the windows to said room, had been off for some time, and the glass window was fastened down by a nail. On the night the robbery is alleged to have been committed, the persons who usually slept in the room, were at a ball; and that between the hours of 9 and 10 o'clock, Wright went to the ball and gave the key of the house to one of them. It also appeared in evidence, that a noise was heard by Daniel J. Owens, between the hours aforesaid on that night, which he, Owens, thought was caused by a cat breaking a tumbler in his own house, which noise was in the direction of the window of Wright's room, which had no shutter, the said window being not more than fifteen feet from Owens, who was in his own room at the time. A pane of glass in the window, was broken out, and the iron safe left open, and had the appearance of being forced open. Wright had been seen to enter through this window by Owens once, before the night of the robbery, alleging that the young men had the key and were absent.

It was also in evidence, "that the place where Wright kept

they, was such as is usual for merchants or bank agents to in Atlanta. Wright lost his own money, that was in the at the time; that R. B. Cuyler, the President of the, had been in the room occupied by Wright as agent, and no complaint as to the safety or insecurity of the place. Three months after the robbery, the Bank continued Wright as agent in the transaction of business, by sending him by &c. for collection, &c. and continued his salary up to 6th day of June, 1852."

Defendants introduced J. C. Plant, and proposed to prove "that he was agent of the Marine & Fire Insurance; and that it was the custom of that Bank to furnish strong substantial safes to their agencies, for the safe-keeping of money", which, on motion, the Court rejected, and Counsel for defendants excepted.

Defendants then proposed to prove by Plant, "that banks look to outer doors and windows for security to their monies, papers, &c. but to their vaults and strong safes", being objected to, the Court refused, and Counsel for defendants excepted.

No other evidence was adduced, which it is unnecessary, to set forth.

Counsel for defendants requested the Court to charge the "that a person standing in the relation which defendant owed to the plaintiff, is not liable, at all events, for the safety of the money entrusted to him. He is not liable for ordinary diligence, but he is bound for ordinary diligence; that if the Jury believed that the evidence established Wright was a man of ordinary prudence, in the management of his own affairs, and he took the same care of plaintiff's money as he did of his own, he is not liable in law." The Court refused to charge exactly as requested, but did charge that Wright was bound to take the same care of plaintiff's money as men of ordinary prudence would take of their own. He was bound for ordinary diligence only; but the question for the Jury to decide was, did he keep this money

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with common prudence or ordinary diligence? not whether he was a man of ordinary prudence in the management of his affairs, generally—and his own money was with plaintiff's, and taken at the same time. A man of well established prudence may, in a particular instance perhaps, be guilty of the grossest negligence; and if loss resulted to one trusting him as plaintiff did Wright, by reason of his negligence, he would be liable. The Jury will therefore look to all the facts and circumstances, as described in evidence; and if, from the examination, are convinced that Wright, on this occasion, whatever may be his general character, acted negligently, without common prudence or care—in that event, in the opinion of the Court, he and his securities are liable, in law, to the plaintiff, for the damage sustained. It is therefore proper that the Jury should consider every fact in evidence, to arrive at a satisfactory conclusion as to the character of the diligence and prudence observed; and they may consider that a shutter had been allowed to remain from the window; the window sash was left in a condition, that the nail, if any, which fastened it down, could have been drawn from the outside, with an instrument or thumb and finger; that the young men who slept in the room where the safe was kept, were out at a party, the night of the alleged robbery, with the knowledge of defendant; that the chest and place were not suitable for keeping so large an amount of money. These facts had been alleged and insisted on in argument—did they exist? If the Jury believe they did, let them say, from the facts, do they show ordinary diligence on the part of Wright, under all the circumstances, as detailed? If they do, then he is not liable; if they do not, then Wright is liable to plaintiff." The Court further charged the Jury, "that if they believed from the evidence, that Wright had been guilty of criminal conduct; that is, in being, himself, the robber, in that event, there was an end to the inquiry; for the defendant and his securities would, unquestionably, be liable to plaintiff." To which charges and refusal to charge by the Court, Counsel for defendants excepted; and upon these several exceptions, error is assigned.

MCDONALD and H. WARNER, for plaintiff in error.

POE, NISBET & POE, for defendant in error.

By the Court.—**LUMPKIN**, J. delivering the opinion.

[1.] Did the Court err in rejecting the testimony of Plant? It was proposed to prove two facts by this witness—First, That he was the agent of the Marine Insurance Bank, and that it was the custom of that Bank to furnish its agents with a suitable place and iron-safes for keeping, securely, the funds in their hands; and Secondly, that banks and other custodians of money, do not look to doors and windows for protection, but to their vaults and strong boxes.

We see no error in the Court, in refusing to admit that portion of the testimony, which went to establish the usage of the particular Bank for which the witness was employed. It does not appear, however, that Mr. Wright ever applied to his principal, to be provided with additional means of security for keeping their cash, or complained that they had not been furnished. On the contrary, the proof is, that he undertook, for the consideration paid him, and the collateral benefits resulting from his agency, to keep the money and effects of the Central Railroad & Banking Co. by such means as he, himself, could command.

[2.] As to so much of Plant's evidence as seeks to show the opinion entertained, by banks, as to the relative value or strength of outside fastenings, and vaults, and safes, we do not see why it should have been ruled out as incompetent. The proof was certainly pertinent to the issue: as to its weight, we express no opinion.

[3.] We see no error in the refusal, by the Court, to give the special instructions asked, namely: that if the Jury believed that Wright was a man of ordinary diligence, and kept the plaintiff's money with the same care that he did his own, they could not find against the defendants.

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This is not the law of this case; for, as was very properly remarked by the presiding Judge, a man, even of extraordinary prudence, might be guilty of gross negligence, in a particular instance, both as it respects his own money and that of other people. The rule to be deduced from a careful examination of all the authorities upon this subject, seems to be this: that an agent for hire, and without specific instructions, is bound to observe all the precautions ordinarily pursued, in relation to the particular business in which he is employed; and according to the usage of the place, and the circumstances of the times within which the business is transacted.

What might be extraordinary care at one place and under one set of circumstances, might amount only to ordinary diligence, at other places and under a different state of facts. While burglaries were nightly perpetrated, or attempted, in Augusta, on a recent occasion, surely *ordinary* diligence would demand a degree of watchfulness and care, which would not be thought of under other circumstances. So, when Roberts and his gang were at large and hovering around a place, what man of common prudence would not guard his own treasure, as well as that of others, with more care and caution? We use these illustrations, to make the rule which we have here prescribed, intelligible.

For the sake of convenience, we propose to transpose the third and fourth assignments, and consider the latter first.

[4.] Was the Court justified in charging the Jury, that if they should find that Wright himself was the robber, he and his securities were unquestionably liable? It is objected that there was nothing, either in the pleadings or proof, to authorize this charge. What is this case? Wright was appointed by the Central Rail-road and Banking Company, their agent at Atlanta. He gave bond, with security, conditioned that he would well and truly execute, and faithfully discharge the duties required of him in said office; and all other duties required of him, in the business of his employers. The proof was, the principal business required of Wright, was to discount

bills on Savannah, drawn on shipments of cotton and other produce; to collect papers; circulate bills, &c. as Bank Agent.

Now, the breach of the bond is not the robbery resulting from the carelessness or misconduct of the agent, but his failure or neglect to pay over some sixteen or eighteen thousand dollars of the plaintiff's money in his hands. Wright's defence is, and he files a special plea to that effect, that on the night of the 16th of March, 1852, his room, where he kept plaintiff's money, was feloniously entered, and the money was stolen from the iron chest in which it was locked up. Now, if the defendant failed to show that the money was burglariously taken, and that, too, under circumstances, which, in law, would afford him protection, he, of course, was liable for failing to account for this fund; and consequently, this charge was wholly unnecessary, so far as the rights of the plaintiff were concerned, though certainly true as an abstract proposition.

But it is insisted, that the charge was erroneous, because hypothetical—there being no proof to establish the guilt of Wright.

But it was incumbent on him to make it satisfactorily appear that some one else was guilty, even if he cannot identify the particular person: otherwise, his plea falls to the ground, and he remains liable for the acknowledged defalcation. Conceding that the window of the room was forced, and the safe entered at the time alleged, does the proof indicate the felon? Has any one been prosecuted and convicted, or even suspected of this crime? The guilty party has hitherto escaped detection. Does the evidence show that any one but Mr. Wright knew that this room would be vacated during the short interval which intervened, between the time of the delivery of the key to the clerks, and the breaking of the pane of glass in the unshuttered window, which was heard in the neighborhood? Does Mr. Wright prove an *alibi*, or any other fact which is inconsistent with his own guilt?

These remarks are elicited, not for the purpose of criminating Mr. Wright, or even insinuating that he, himself, was the author of a feigned robbery: but to show that the Court was not wholly

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unwarranted by the proof, in the charge which it gave. The only doubt is, whether, if the plaintiffs put their recovery upon this ground, and not merely on the failure to account, the defendant should not have been notified by the declaration of such intention; so that he might offer rebutting testimony as to his good character, and every thing else which would establish his innocence.

[5.] One question more remains to be considered. In conclusion, his Honor, the Circuit Judge, undertook to sum up the evidence. In doing so, he grouped together a few of the most prominent facts against the defendant, and charged the Jury, that if they believed them, under all the circumstances, as detailed, then they should find for the plaintiff.

It is not, necessarily, the duty of the Court to sum up in conclusion. It is the privilege of the Court to do so. Under our Statute, forbidding the Judge to intimate as to what is or is not proven, it is extremely difficult to avoid the inhibition contained in the Act. Still, it may be done, and must be done, or a new trial is the consequence. We do not say, that in summing up, every material fact must be stated. But we do say, that it is not just to present the proof prominently on one side, and omit the countervailing evidence, entirely, on the other.

And this is the defect in the charge. His Honor, in commenting on the nature of the diligence observed by the defendant, told the Jury that they might consider that a shutter had been allowed to remain from the window, the window-sash was left in a condition that the nail, *if any*, which fastened it down, could have been drawn from the outside with an instrument, or with the thumb and finger; that the young men who slept in the room where the chest was kept, were out at a party the night of the alleged robbery, with the knowledge of the defendant, Wright; and that the place and chest were not suitable for so large an amount of money.

But he omitted to remind them, at the same time, that Wright had provided a means of equal, or greater security, than was found, ordinarily, in the City of Atlanta; that he provided himself with an iron chest; that it was kept in a room where

two young gentlemen usually slept; that the sash of the window was secured by nails inside; that Wright was careful of the money entrusted to his keeping; that he deposited his own money in the same place; that for several months after the alleged robbery, plaintiffs retained Wright in their employment, and that the President of the Company, Mr. Cuyler, had been in the room and saw Wright's mode of keeping money, and made no complaint.

Upon the whole, we think it best that the cause be sent back for a re-hearing. To the plaintiffs, it is a matter of delay only, should they finally recover. To the defendant, it is a question of character, and both to him and his securities, one of pressing pecuniary importance. It should be fairly and fully heard.

No. 10.—THOMAS T. WYCHE and WIFE, plaintiffs in error, vs. THOMAS B. GREENE, defendant.

[1.] Where there are two defendants to a bill, both of whom answer, and leave is subsequently granted to amend the bill; and one appears and demurs to the amended bill, before the other has been served with a copy: *Held*, that in a writ of error to reverse the judgment upon demurrer, it is not necessary to join the defendant not served; and that his rights, neither in the Court below, nor in this Court, are impaired by such omission.

The defendant in error joined issue with a *protestando*, and moved to dismiss the writ of error, on the grounds—

1st. Because Elias McElvin was, and is, a party defendant in the Court below, and ought to have been made a party to the proceedings in error, but has not been made a party thereto.

2d. Because the said Elias McElvin hath had no notice of the signing and certifying the original bill of exceptions, nor of the writ of error and citation.

The facts were, that the bill was filed against Thomas B.

Greene, and Elias McElvin, as administrator of Batt Wyche. The defendants filed separate answers to the bill. After the filing of the answers, to-wit: at May Term, 1854, of Upson Superior Court, complainants obtained leave to amend, and did amend, their bill: whereupon, Greene, one of the defendants, demurred, both to the amendments, and to the whole bill as amended—the other defendant, McElvin, not demurring, and not having been served. The Court sustained the demurrer, and dismissed the bill, and complainants sued out a writ of error, and gave no notice to the defendant, McElvin.

CHAPPELL & GREENE, for the motion.

GIBSON & HILL, contra.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Was it necessary that Elias McElvin should have been joined in this writ of error? We think not, most clearly. Leave was granted to amend the bill, after answer, by both defendants. Upon the filing of the amendment, and before, McElvin was served with a copy; Greene, the other defendant, appeared and demurred to the amended bill, and the demurrer was sustained. And it is to reverse this judgment, that this writ of error is presented by Wyche, the complainant. McElvin, one of the defendants to the original bill, was no party to this interlocutory decree. Nor can his rights be impaired, either by the judgment rendered in the Court below, upon the demurrer, nor upon the writ of error in this Court. But when served with the amended bill, he may demur separately, and bring his writ of error in the same manner as though no such former proceeding was ever had. Like all other parties, he is entitled to his day in Court, and he cannot be prejudiced without it.

So far, then, from being a necessary party to this writ of error, he could not have been joined in it, without his consent, and a waiver of all of the preliminary privileges of being served with the amendment, &c. secured to him by law.

Motion denied.

**No. 10.—THOMAS B. WYCHE and WIFE, plaintiffs in error, vs.
THOMAS B. GREENE, defendant in error.**

- [1.] The interposition of a Court of Equity to correct mistakes, both as to law and fact, by ordering a proper deed to be executed, according to the true intent of the parties, is a very ancient doctrine.
- [2.] Case of *Lansdowne vs. Lansdowne* approved.
- [3.] It has always been a familiar branch of Equity jurisdiction, to grant relief to parties, against agreements made under a misconception of their rights.
- [4.] In every case under this head of the law, the only inquiry is, does the instrument contain what the parties intended it should and understood that it did? Is it their agreement? If not, then it may be reformed by *aliunde* proof, so as to make it the evidence of what was the true bargain between the parties. And it is wholly immaterial from what cause the defective execution of the intent of the parties originated.
- [5.] Questions on demurrer, amendments to pleadings, &c. are constantly brought up for review before this Court, which have not been distinctly presented to and actually passed upon by the Superior Court. This is a growing evil, and one which ought to be corrected.
- [6.] A Court of Equity will not aid one volunteer against another: neither will it enforce a voluntary contract.
- [7.] If a voluntary contract, however, be actually executed, then a Court of Equity will enforce all the rights growing out of the contract, against any body.
- [8.] If the most unequivocal testimony is required, before Courts of Equity will grant relief against written contracts, the antiquity of the transaction, as well as the fact that the donor, himself, was the draftsman of the instrument, increases the difficulty as to the satisfactoriness and sufficiency of the proof.

In Equity, in Upson Superior Court. Decision on demurrer, by Judge STARKE, May Term, 1854.

This was a bill filed by Thomas F. Wyche and Adeline W. Wyche, his wife, against Thomas C. Greene of Upson county, and Elias McElvin of Decatur county. The bill states, that the complainants were intermarried in 1839; that Adeline W. is the child of Patience C. Greene, the wife of the defendant,

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and daughter of Batt Wyche, late of Montgomery county; that the defendant and Patience C. were married in 1814; that Patience died in 1848; that Batt Wyche, in 1817, and for some time previous thereto, entertained the wish and purpose to loan to his daughter, Patience C. for her life-time, four negro slaves, to wit: Sally, Moses, Ellick and Sealy, together with all their increase, previous and subsequent to that time; and at the death of his daughter, to give the said negroes and their increase, in fee-simple, to the children that were and might be born of the said Patience, at her death: the same to be divided, share and share alike among them, immediately upon her demise; that with the design of loaning and giving said negroes and their increase in manner aforesaid, and for the purpose of carrying the same into effect, the said Batt Wyche executed the following deed of gift:

"STATE OF GEORGIA, MONTGOMERY COUNTY:

Know all men by these presents, that I, Batt Wyche, for and in consideration of the love and affection which I have and bear unto my well beloved daughter, Patience Clark Greene, and the issues of her body, do give, grant and relinquish unto the said Patience C. Greene and issue, four negro slaves, to wit: Sally, Moses, Ellick and Sealy, together with all their increase, heretofore and after these presents, the rights thereof whatsoever, unto the said slaves and increase, to have and to hold the said slaves and increase as aforesaid, unto the before-named Patience C. Greene and issues forever, freed and cleared of and from the claim of him, the said subscriber. In witness whereof, the said Batt Wyche has hereunto set his hand and seal, the 15th day of February, 1817.

BATT WYCHE, [L. s.]

In presence of

W. CONNER,

J. G. CONNER, J. I. C.

"I make an addition to the within deed, of five hundred dollars, in place of one small negro and other things.

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Given under my hand, this 6th day of October, 1817. To
be paid next fall. **BATT WYCHE."**

Test, **WILSON CONNER, J. I. C."**

"Received, the 12th of April, 1819, four hundred and fifty
dollars of the above deed. **THOMAS B. GREENE."**

"Received, June 2d, 1821, in full of the above, fifty dollars.
THOMAS B. GREENE."

The bill further charges, that on the day when said deed was executed, or about that time, that the said Batt Wyche, for the purposes hereinbefore stated, delivered the deed of gift to Greene, his son-in-law, who received the same, to be held for the use and benefit of his wife and children; and that he did, in point of fact, so hold said deed until the year 1824, when he gave up the same to the administrator of Batt Wyche, to be used as a voucher or for some other purpose, unknown to the complainants; and that said instrument was found, in 1850 or 1851, among the papers of George Wyche, who is now dead, but who was one of the administrators of Batt Wyche; and that McElvin is the administrator of Batt Wyche. The bill further charges, that the four negroes mentioned in the deed, were delivered by Batt Wyche to Thomas B. Greene. It further charges, that the draftsman, in drawing said deed of gift, failed to use apt words to carry the design and purpose of Batt Wyche into effect, as clearly set forth; and that the scrivener, in framing the instrument, made a mistake in this: that instead of loaning the negroes and their increase to Patience C. Greene, during her life, and at her death, giving the property in fee-simple to the children, the writer drew the deed so as to convey the negroes to Mrs. Greene, absolutely, and the issue of her body. The bill avers that this was the result of accident, and that Batt Wyche, at the time of executing and delivering said deed of gift, intended the same to be a conveyance by deed of gift, that loaned the four slaves and increase to Mrs. Greene for her life only, and at her death, gave the same to her children, to be equally divided between them, share and share alike.

The bill further charges, that Thomas B. Greene, when the

deed was executed, and when he took the same, had notice that the deed of gift was intended, by Batt Wyche, to convey the negroes as before stated; and that Batt Wyche, during his life-time, understood and believed that the deed of gift was drawn, in conformity with the purpose which he had in view in executing it; and that Greene received the deed, with notice of this fact, and so held the same, with the negroes, for the benefit of his wife and children, as before charged.

The bill further stated, that the increase of Sally and Scaly, amounted to twenty-nine in number, giving their names and description—all of which, together with Ellick, were in the possession of defendant, in March, 1850; that he had given Moses to one Eliazur Adams, one of the descendants of his wife; that the complainants instituted their action of trover, returnable to the April Term, 1850, of Upson Superior Court, for the recovery of the said thirty-one slaves, against the said Greene—upon which, a trial was had in October thereafter, when the Circuit Judge refused to allow the complainants to show the alleged mistake, and decided that the deed of gift vested an absolute title to the negroes, in Thomas B. Greene; and that in consequence of said decision, a verdict and judgment were rendered in favor of the defendant in the action. The bill charges that an appeal has been entered, and that the same is now pending, and which will stand for trial at the ensuing term of the Superior Court, unless restrained, and that complainants will be again compelled to submit to a defeat, unless they can have the deed of gift reformed, so as to represent and carry out the design of Batt Wyche in making the same, at the time it was executed and delivered. The complainants pray for an injunction, and that the mistake may be corrected and the writing reformed.

On the 18th September, 1851, the bill was presented by the complainants to Judge STARKE, in vacation, at Chambers, for his sanction, who refused to grant the same. This decision of Judge STARKE was, upon writ of error, reversed by the Supreme Court at Macon, February Term, 1852.

On the 31st day of August, 1852, Greene answered the bill, and McElvin filed his answer in March, 1853.

On the 6th day of May, 1854, complainants filed an amendment to their bill, alleging the execution of an addition of five hundred dollars to the said deed of gift, by Batt Wyche, and which was endorsed upon said deed; that the same had been paid to Greene, for the use and benefit of his wife and children, as charged in the bill; that they were entitled to receive the same, with interest thereon, from the death of Patience C."

At the May Term, 1854, of said Superior Court of Upson, complainants further amended their bill, in which amendment they charge that B. Wyche, himself, drew the deed of gift; that he was not skilled in drawing such instruments, and that it was his intention so to have drawn the same, as to have conveyed an estate for life, in said negroes, to his daughter, Patience C., and at her death, in fee-simple to her children; and that by a mistake of the said Batt Wyche, in the use of words not proper and technical for the conveyance of such meaning, the said intentions of said Batt Wyche, failed to be equally expressed therein.

After the filing of the amendments, the defendant, Thomas B. Greene, demurred to said amendments, and to the whole bill as amended, upon the grounds—

1st. Because the bill, as amended, is multifarious.

2d. Because said bill, as amended, presents a case in which Equity will not interfere to reform the written instrument, under which complainants claim, for the purpose of enabling the complainants to recover thereon.

3d. Because it does not appear, by the bill or amendments, that Batt Wyche was the owner of the negroes specified in the deed of gift: nor does it appear who was the owner of said negroes, or that the said Thomas Greene was not their owner at and before the execution of the said deed of gift."

After argument of the demurrer, and before the decision of the Court thereon, complainants were allowed to amend their bill further—in which amendment they charged, "that at the time of the execution of said deed of gift, the titles to said ne-

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groes was in the said Batt Wyche, and that Greene had notice of the same at the time; that when said Batt Wyche drew and executed said deed of gift, it was his intention so to draft it, that it would convey to said Patience C., an estate for her life in and to the said negroes and increase, and at her death, an estate in fee-simple, to her children; and that Greene then and there well knew that such was the intention of the said Batt Wyche, and that he received said deed with such knowledge as aforesaid."

The Court sustained the demurrer, and dismissed the bill and amendments, and Counsel for complainant excepted.

GIBSON & HILL, for plaintiff in error.

FLOYD & CHAPPELL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

The plaintiff in error filed a bill against Thomas B. Greene and Elias McElvin, as administrator of Batt Wyche, deceased, for the purpose of having a deed of gift reformed, on the ground of mistake in drafting the same.

The bill, as it stood originally, was to the effect, that Thomas B. Greene's deceased wife, Patience C. was the daughter of Batt Wyche of Montgomery county; that Thomas B. Greene intermarried with his wife in 1814, and by her, had a numerous family of children, of whom Adeline, the wife of Thomas T. Wyche, the complainant, was one; that in 1814, Batt Wyche entertained a wish and design to secure to his daughter Patience, for life, and to her children, at her death, four negro slaves: Sally, Moses, Ellick and Sealy, with all their increase; that to accomplish this object, he procured one J. G. Conner or some other draftsman, to draw a deed of gift, a copy of which is annexed to the bill, as part thereof; that said deed of gift was executed by Batt Wyche in 1817, and by him delivered to Thomas B. Greene; and that the said Thomas B. received the same, to be held, together with said negroes and their increase, for the benefit of the said Patience C. and her children;

and that he did so hold and keep said deed of gift, till after Batt Wyche's death.

The bill further states, that the draftsman made a mistake in drawing said deed of gift in this : that said deed conveys the title of said negroes and their increase, to said Patience C. and issue, when, in truth, at the time of preparing, executing and delivering said deed, it was said Batt's instruction and direction to convey said negroes to the said Patience, for her lifetime only ; and at her death, in fee-simple to her children ; and that up to his death, Batt Wyche thought said deed so conveyed said negroes ; and that Greene, at the time of receiving, and while he held the same, had notice that such was the nature and design of the conveyance.

The following indorsement was on the back of the deed : "I make an addition to the within deed, of five hundred dollars, in place of a small negro and other things. Given under my hand, this 6th day of October, 1817, to be paid next fall.

BATT WYCHE."

The deed was duly recorded in the Clerk's office of the Superior Court of Montgomery county, on the 27th day of May, 1817.

Thomas B. Greene kept the deed till 1824, and then delivered it to George Wyche, administrator of Batt Wyche, among whose papers it was found in 1850 or 1851.

The bill prayed that the alleged mistake might be corrected, and the instrument reformed, according to the true intent and meaning of the parties. It also prayed an injunction, to restrain a trover action then pending between the parties. Upon being presented to Judge STARKE, he refused to sanction the bill, for various reasons : to which decision and refusal, complainants, by their Counsel, excepted. And the cause was then brought before this Court, upon writ of error. After solemn argument, this Court reversed the judgment of the Circuit Judge, holding, that assuming the facts charged in the bill to be true, that the deed of gift from Batt Wyche to Greene and wife, did not contain the actual agreement between the parties ; that it was not what they intended it should be, and thought it

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was; that the draftsman, by mistake, either as to fact or as to law, drew a different contract from the one contemplated by the donor, and understood and accepted by the donee; and that consequently, Equity ought to interpose and compel the parties to execute their true agreement, and not that which was reduced to writing; that while Chancery had no power to make contracts for parties, or to substitute one for another, it could and would decree, that they should reform those which they had actually made; and if the paper does not fulfil or violates their understanding, it will be rectified and made to conform to it. (11 Ga. R. 171.)

The bill having been sanctioned and filed, under the order of this Court, the defendant, Greene, answered the same; and the case standing for trial, the complainants discovered their inability to make out, by proof, such a case of mistake as that set forth in the bill, they obtained leave to amend their bill, so as to make it correspond with the proof. And by the bill, as amended, the averment is not that Batt Wyche procured one J. G. Conner or other person to draw the deed, but that he drew it himself; that he was not skilled in framing such instruments, and that it was his intention so to have drawn the same, as to vest a life-estate in Mrs. Greene, and the fee in remainder, in her children; and that by mistake, in the use of words not proper and technical, the intention of Batt Wyche failed to be legally expressed. And instead of alleging that it was the instructions and directions of Batt Wyche, that the deed should be drawn in a particular way, the bill charges that it was the intention of Batt Wyche, himself, so to have framed it.

To the amended bill Greene demurred, McElvin not having been served with a copy of the amendment; and he insists, that by the amendment, the character of the bill is wholly changed; that, as originally brought, it presented a case of *mistake, in fact*, for which it asked relief; that now, it made a case only of *ignorance or mistake of law*, for which Equity could grant no aid.

The demurrer was sustained by Judge STARKE and the bill

dismissed. The complainants, by their Solicitors, excepted; and thus, the case comes again before this Court for revision.

We concur with Counsel for Mr. Greene, that the sole question presented by the record and bill of exceptions is, whether the bill, as amended, presents such a case of mistake and error in the drawing of the deed of gift, from Batt Wyche to his daughter, as to entitle the complainants to a decree in Chancery, against the defendant, Greene, directing said conveyance to be rectified as prayed for by the bill.

If the judgment of the Court upon the case, as originally made, was right, then we are clear that the judgment of the Court below, upon the demurrer filed to the amended bill, was wrong.

It is to be deeply regretted, that there is so much confusion and uncertainty, as it respects this important branch of Equity jurisdiction. Judge Story admits that the English Elementary Writers treat the subject in a very loose and unsatisfactory manner, laying down no distinct rules, when mistakes of the Law are or are not relievable in Equity, but contenting themselves, for the most part, with mere statements of the cases. Whether the same criticism does not apply, to some extent at least, to the learned Commentator himself, as well as to *Madcock*, *Jeremy*, *Cooper*, *Tenbruncker*, *Mitford*, *Newland*, and those who had preceded him, no one, I think, will doubt, who has read his *5th Chapter, Volume I. Title Mistake*.

All writers on Equity lay down the rule, that mere ignorance of the law, is no sufficient ground for rectifying a contract; yet, they state so many exceptions, that the rule is utterly smothered and lost sight of. It is, to my mind, highly desirable that the Courts would hold, if they have the power; and if not, that the Legislature would enact, with Lord King, in *Lansdowne vs. Lansdowne*, (*Mosely*, 364,) that the maxim, ignorance of the law will not excuse, applies only to criminal cases, and not to civil contracts; or that no mistake of law, whatever, should be corrected. Like Mr. Calhoun's and Mr.

Webster's antipodal interpretations of the Federal Constitution, either would be intelligible, while all between is *terra incognita*.

By way of testing the sufficiency of the present bill, as amended, let us briefly examine some of the doctrines maintained by standard authors and eminent Judges, upon this subject.

[1.] By reference to *Spencer's Equitable Jurisdiction*, (1 Volume, 633, note 4,) it will be found that the interposition of a Court of Chancery, to correct mistakes, both as to law and fact, by ordering a proper deed to be executed, according to the true intent of the parties, was a doctrine of very ancient, as well as familiar occurrence. One of the old Chancellors, *Stillington*, Bishop of Bath and Wells, in the time of *Edward IV.* put it upon what seems to have been a favorite maxim with him, namely: *Deus est procurator fatuorum*—which, as I understand it, means that God is the supervisor or guardian of fools: that is, intervenes to save those from their own errors, who are incapable of taking care of themselves. And therefore, Courts of Conscience, His vice-regents, will perform the same office.

[2.] The case of *Lansdowne vs. Lansdowne*, I know has been often questioned and doubted; and yet, in *McCaitly vs. Decaise*, (2 Russ. & Mylne, 614,) Lord *Brougham* held, that where a husband renounced his title to his wife's property, from whom he had been divorced, under a mistake in point of law, that the divorce was valid, and he had no longer any title to her property; and under a mistake of fact as to the amount of the property renounced, the information respecting which the other party knew and withheld from him, he was entitled to relief. Judge *Story* suggests that the relief in this case seems to have been granted upon mixed considerations. But his Lordship, in one part of his opinion, said—"what he (the husband) has done, was in ignorance of law—possibly of fact; but in cases of this kind, *that would be one and the same thing*".

I submit, respectfully, that this opinion indorses, fully, that of Lord *King*, in *Lansdowne vs. Lansdowne*, and which I believe, myself, to have been a most righteous and legal judgment, whether viewed as a case of misrepresentation of a fact;

that the party was not heir, when, in fact, he was heir, or mere ignorance or mistake of the law, as to his true *status*, in relation to the estate of his deceased uncle.

[3.] Indeed, the English Books abound in cases where Equity has granted relief to parties, against bargains and agreements, made under a misconception of their rights. *Bingham vs. Bingham*, (1 Ves. Sr. 128.) *Cocking vs. Pratt*, (Ib. 400.)

Hunt vs. The Administrator of Rensmarriere, is a leading precedent in this country, upon this doctrine; it has never been over-ruled or shaken; indeed, it has been pretty generally followed, by most of the State Courts throughout the Union. It was four times elaborately argued and thoroughly considered, twice before the Circuit and twice before the Supreme Court. Chief Justice *Marshall* delivered the opinion of the Court, upon the first hearing, at Washington, from which we extract the following sentences: "although we do not find the naked principle, that relief may be granted on account of the ignorance of the law, asserted in the Books, we find no case in which it has been decided, that a plain and acknowledged mistake is beyond the reach of Equity". And the Decree concludes thus: "and we are unwilling, where the effect of the instrument is acknowledged to have been entirely mistaken by both parties, to say that a Court of Equity is incapable of affording relief". (8 *Wheaton*, 174.) And in the final opinion, delivered by Judge *Washington*, in this case, it is laid down as an incontrovertible principle, that "wherever an instrument, which purports to set out the contract, violates by omissions or insertions, the manifest intention of the parties to the agreement, Equity will correct the mistake, so as to produce a conformity in the instrument to the agreement". And the learned Judge assigns this obvious and most sensible reason for the rule: "the object of Courts is, to carry out the contracts of parties, fairly and legally entered into; and if the instrument, from want of skill or mistake, or for any other cause, is insufficient to execute the intention of the parties, the writing, itself, might be enforced, but the agreement, itself, would remain

as unexecuted—as if one of the parties had refused, altogether, to comply with his agreement; and a Court of Equity will, in the exercise of its acknowledged jurisdiction, afford relief, as well in one case as in the other, by compelling the delinquent party, fully to perform his agreement according to the terms of it, and the manifest intention of the parties". (1 *Peter's S. C. R.* 1, 14.)

It may be suggested that this was the mere *obiter* of the individual Justice. It will be borne in mind, however, that every opinion emanating from the Supreme Court of the United States, undergoes the revision and approval of the whole Bench. And I have learned from a reliable source, that a large portion of what is now considered as settled law in that tribunal, originated in *dicta*, similar to this which I have cited. The principle then, thus emanated as *incontrovertible*, comes clothed with the moral, if not the legal sanction of a judgment.

Counsel for the defendant in error, profess their willingness to stand or fall by the doctrine, as taught by Judge *Story* in his Commentaries on Equity. And they insist on binding us by that authority. To that, then, let us go.

In his *Fifth Chapter*, on *Mistake*, he commences by expounding the well-known maxim, that ignorance of law will not furnish an excuse for any person, either for a breach or an omission of duty. He then proceeds to state numerous exceptions to the rule, until he reaches the 136th *Section*, where the author thus continues: "there are also some other cases, in which relief has been granted in Equity, apparently upon the ground of mistake of law. But they will be found, upon examination, rather to be cases"—of what?—"defective execution of the intent of the parties, from ignorance of law, as to the proper mode of framing the instrument".

Now, I ask, is not the case made by the amended bill, in literal conformity to the very language of the learned commentator? And yet, I should infer that the pleader, in framing this amendment, did it with this identical paragraph before his eyes. If the text in this treatise, as just quoted, is the law of this case,

and we hold that it is, then is there Equity in this amended bill.

But it is earnestly and ably argued, that there is a wide difference between the reformation of a contract, drawn by a scrivener, under instructions from the maker, and the correction of a paper, framed by the party himself. We confess, candidly, that we are unable to comprehend the distinction. That the proof will be more difficult in the one case than the other, I can readily perceive.

But I direct a scrivener to prepare an instrument for a certain purpose. It is read to, or by me, executed and delivered. A mistake, here, it is conceded, is relievable. What difference can it make, if I, myself, have drawn the contract? In the latter case, I repeat, it may be more difficult to prove that the defective execution of the intent of the party, was the result of ignorance of the law, but in principle, the two cases occupy the same footing. Neither Judges *Marshall* or *Washington*, Judge *Story*, or any one else, who has discussed or adjudicated this question, recognize any such distinction as that now made, viz: whether the instrument was framed by the party, himself, and some third person. And this is the only change made in the original bill, by the amendment.

Now, I grant, that if the bill charged, that owing to the confidence of the party in the scrivener, he omitted to scrutinize the instrument closely, this would constitute an independent ground of Equity: otherwise, it is immaterial whether the party, himself, or another, be the draftsman. The doctrine rests on no such distinction.

[4.] In every case, under this head of the Law, the only inquiry is, does the instrument contain what the parties intended it should, and understood that it did? Is it their agreement? If not, then it may be reformed by *aliunde* proof, so as to make it the evidence of what was the true bargain, or contract, between the parties. And it is wholly immaterial, from what cause the defective execution of the intent of the parties originated.

But another ground has been argued against the maintenance

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of this bill. Whether it was taken in the Court below, the record does not disclose.

[5.] We are daily impressed with the difficulties under which we labor, and the increase of work in which we are involved, in having questions upon demurrers, amendments to pleadings, &c. brought up for review before this Court, which have not been distinctly presented to and actually passed upon, by the Superior Court. It is a growing evil, and one which ought to be corrected. The Court of Errors, in New York, stood in the same relation to the Supreme Court and Court of Chancery in that State, that this Court does to the Superior Courts here. And the Organic Law, creating these appellate tribunals, was very similar. And it was repeatedly decided and considered settled law there, that no matters assigned for error, would be heard, except such as were actually passed upon by the Court below. (*The President, &c. of the Bank of Utica vs. Smedes*, 3 Cowen, 662, 684; *Golden vs. Knickerbocker*, 2 Ib. 49, 50; *Gelston, &c. Al. vs. Hoyt*, 13 Johns. Rep. 561; *Wood vs. Young*, 5 Wend. 637; *Campbell, adm'r, &c. vs. Stokes*, 2 Wend. 146, *Per Walworth, Chancellor*; *Houghton vs. Starr, adm'r, &c.* 4 Wend. 179; *Ward vs. Lee*, 13 Wend. 41.)

[6.] But waiving this for the present at least, let us consider this second objection. It is contended, that the conveyance from old man Wyche being voluntary, that Equity will not enforce, that Greene and the complainant are both volunteers; and that between such, Equity will not generally interfere, but leave the parties, as to title, where it finds them; that it will not aid one volunteer against another; neither will it enforce a voluntary contract.

[7.] To this rule, there is an important qualification. If the contract is actually executed, then a Court of Equity will enforce all the rights growing out of the contract, against any body. Here, the gift having been consummated by the donor, by the delivery of the title-paper, together with the negroes, it would be enforced against him and all others, in favor of all

who have rights growing out of it. See 1 *Story's Eq. Jur.* § 433, and note 8.

And is not this right? In the apparent conflict of Courts and cases, it is always well, to let conscience speak. Now Mr. Greene having taken the instrument, with notice, and, therefore, knowledge, that it was designed to give the slaves, and their increase, to his wife for life, and after her death, to her children, would it be just that he should hold on to the remainder, and refuse to surrender it up, after the termination of the life-estate, by the death of Mrs. Greene?

Rectify this instrument, and there is no conflict between the titles of these parties to this property. One took an estate for life: the other the remainder in fee. The one having taken effect, and been fully enjoyed, shall not the defendant be adjudged a trustee, holding for the benefit of his children?

[8.] We are aware that the difficulty of supporting his case, by proof, will be great. The testimony, under all the circumstances, should be overpowering; not only on account of the antiquity of the transaction, but likewise, because Mr. Wyche, himself, penned the paper. The Jury must be satisfied, beyond a reasonable doubt, that at that very point of time, his purpose was to frame the instrument, otherwise than as he did. This will be hard to do—still, it will not be impossible. And the complainants are entitled to the privilege of making the effort. If they fail, it will be for want of evidence, and not because they are denied the opportunity of adducing it. Their miscarriage will then be their misfortune, and not the fault of the Courts.

No. 11.—HARRISON B. SARGENT, plaintiff in error, vs. ROBERT CALDWELL and others, defendants in error.

[1.] Where S purchases from C & Co. through their agent D, several negro slaves, giving his promissory note in payment, and receiving a bill of sale, but D wrongfully and fraudulently detains the slaves, and never delivers them, and two of the slaves die in his hands: and afterwards, suit is brought upon this note against S, and he files his bill against these parties, setting forth the above facts—alleging, also, that D, for C & Co. had received hire for said slaves, or was liable for their services to S, after his purchase; and also, that the slaves living had greatly appreciated in value, and were worth more than he paid for the whole: *Held*, that the remedy of S, at Common Law, was not adequate, and that there was equity in his bill.

In Equity, in Coweta Superior Court. Demurrer. Decided by Judge WARNER, March Term, 1854.

This bill was filed by Sargent, against Robert and John Caldwell, and Winthrop B. Williams, as partners, and Adam B. Dulin.

The bill charges that complainant bargained with Caldwells & Williams for four negroes, to-wit: Brutus and his wife Rechia, and their three children; that on the 6th February, 1851, he executed to them his note for \$1400, for said negroes, and received from them a bill of sale for the same: that at the time, the negroes were in the possession of Dulin, as their agent; that the negroes were not delivered to complainant, at the time of the purchase, nor have they ever been, either directly or indirectly, delivered to complainant; that two of said negroes have since died, whilst in the possession of Dulin, which two, complainant does not know.

The bill further charges, that complainant has frequently made application to Dulin, and through him, to Caldwells & Williams, for the delivery of said negroes, or the delivery of his note, that the same might be cancelled—neither of which has been done. The bill charges that suit has been commenced upon said note; that the defendants have entered into a fraudulent combination and collusion, to defraud complainant out

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of the amount of said note. Complainant proposes and offers to bring the amount of money due on said note into Court, to be disposed of as may be decreed by the Court.

The bill further charges, that the two negroes mentioned as now dead, were, before their death, worth \$1500, and their hire, up to that time, of the value of \$400; that the other three negroes are worth \$2000, and their hire, of the value of \$500; and that complainant has lost the whole of said hire. The bill states that Dulin is insolvent, and that the other defendants reside without the State of Georgia.

The bill prayed that the defendants, Caldwells & Williams, might be decreed to account to and with complainant, for the said hire of the said negroes, to deliver those living, and their increase, to complainant, and account for the value of those dead; and that defendants be enjoined from proceeding to collect said note out of complainant; to which was added a general prayer for relief.

To this bill a general demurrer was filed, which the Court sustained, and dismissed the bill: to which decision, Counsel for defendants excepted.

BUCHANAN & MCKINLEY, for plaintiff in error.

MCCUNE, for defendant in error.

By the Court.—STARNES J. delivering the opinion.

In this case, the bill was dismissed, on the ground that complainant had an adequate remedy at Common Law; and this is alleged as error.

Let us see what would have been the remedy at Common Law, and what its efficiency.

First, then, we will suppose that the complainant had made payment of the note, and had instituted his action of *trover* for the negroes. Now, according to the allegations of the bill, such of the parties contracting with him, as are solvent and

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able to respond in damages, are not residents of this State; and Dulin, the party who resides within the State, is entirely insolvent. Therefore, if judgment be obtained on the note, the complainant may be compelled to pay the same, and yet, lose the negroes or their value.

Let us, in the next place, suppose that complainant had relied upon his defence to the action, commenced against him on the note. Under what pleas could he have found full and ample protection and justice?

A plea of total failure of consideration, could not have been sustained, for the complainant had received title to the slaves, and had the right to possession: and this was certainly a part of that for which he bargained. A plea of partial failure, if admissible, would have been but of limited benefit to him. It may be considered questionable, whether or not such a plea would be available, as the complainant had received title to these slaves. But for my own part, I think that such a plea, under the circumstances, would be proper; still, it would not have afforded the protection and benefit desired by the complainant, and prayed for by his bill.

In that bill, he alleges an increased value of the slaves living, for which, he insists, the defendants are liable; and also a liability for the hire or value of the services of said slaves. Of these, he could gain no benefit by such a plea.

Neither would a plea of set-off have been efficient in his defence. Under that plea, he might have recovered hire, but he could not have had the benefit of any appreciation or increase in the value of the slaves, which he might be equitably entitled to recover.

And by none of these pleas could he have brought the parties suing him, to an account for the damage arising from loss of the deceased slaves, which, he alleges, had been wrongfully and fraudulently detained from him, and for whom these parties should be held liable.

We see not, in short, what other action or defence, at Common Law, the complainant could have rendered available and adequate, taking the case made in his bill as true. But Equity

can afford efficient and suitable relief for such a case ; and in so doing, perhaps, avoid multiplicity of suits and accumulation of costs.

We express no opinion as to the best method of affording relief in this case, by a decree in Equity, supposing the case made in the bill to be sustained by proof. The bill is not so advantageously framed, as to encourage us in giving any opinion on this point. Nor must we be understood to express any opinion, as to the right of the complainant to have relief in the way in which he has *specifically* prayed for it. The regulation and direction of all this, we leave to the intelligent judgment of the Court below, according as the case may hereafter present itself.

Judgment reversed.

No. 12.—WILLIAM B. BROWN and others, plaintiffs in error,
vs. LEWIS REDWYNE and another, defendants in error.

- [1.] After a case in Equity has gone to the Jury, it may be amended, by the addition to it of copies of exhibits.
- [2.] In a judgment of the Court of Ordinary, that Court makes recitals concerning matters over which it has jurisdiction: *Held*, that the Superior Court must presume the recitals to be true, until proved to be untrue.
- [3.] An order of the Court of Ordinary, giving to an administrator leave to sell land, recites that the administrator had given notice "in terms of the law", of his intended application for the leave. This order is in evidence: *Held*, not to be necessary that this should also be recited in the administrator's deed, to make the deed admissible as evidence.
- [4.] The notice of the sale of land, which an administrator is required to give "at the door of the Court-house", as soon as the time of sale has passed, perishes, it is to be presumed; and therefore, secondary evidence of its contents may, at any time after the sale, without further foundation than this presumption, be introduced.
- [5.] A Court of Equity cannot enjoin a person not to bring an action of eject-

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ment, against whom not so much as one final verdict in ejectment for the same land, has been obtained by the person praying for the injunction.

[6.] The objection, that a Court of Equity cannot so enjoin a person, may be taken after the filing of the answer, and as late as when the Court is charging the Jury.

In Equity, in Coweta Superior Court. Tried before Judge WARNER, March Term, 1854.

Lewis Redwyne filed his bill in the Superior Court of Coweta county, stating, that under the Lottery Act of 1825, disposing of that portion of the territory of Georgia, which lies between the Flint and Chattahoochee rivers, one James St. John drew Lot Number 161, in the first district of said County, and that the same was granted to him by the State, on the 11th day of October, 1828; that on the 20th of the same month and year, St. John conveyed the land to one Michael Madden; that shortly thereafter, Madden conveyed to one Giles B. Taylor; these deeds contain no covenant of the warranty of title; that in October, 1829, Taylor conveyed, with warranty, to Shadrack Perry; that in June, 1831, Perry conveyed, with warranty, to John Redwyne; that John Redwyne, in Sept. 1831, conveyed, with warranty, to complainant, Lewis Redwyne; that Lewis Redwyne afterwards sold and conveyed the land, with warranty, to one David Dominick, who having died intestate, the land was regularly sold and conveyed by Wm. B. Shell, his administrator, to Sterling Elder: all the deeds were regularly recorded in the proper office; that Elder took actual possession of the land, and made valuable improvements thereon. The bill alleges, that the title was well known and recognized by all persons, previous to that time.

The bill further charges, that William B. Brown, with a full knowledge, and actual notice of all the facts, and especially of the purchase and claim of the said John and Lewis Redwyne, as well as the possession of the said Elder, combining with St. John, the grantee, to injure and defraud complainant for some nominal or inconsiderable sum, bought the lot of land of the said St. John, and took from him a deed, or some other written conveyance of the property. It alleges that St. John and

Madden are insolvent, and that Madden resides beyond the jurisdiction of the State, so that neither of them can be made answerable in damages for the loss of the land; and that the said confederates are prosecuting an action of ejectment, in the name of the said St. John, against the said Elder and the complainant, who was made a co-defendant thereto, by order of the court. The bill further states, that the two witnesses to the deed, from St. John to Madden, are dead, and that the complainant cannot adduce proof of its execution, without appealing to the conscience of the said St. John. The bill prays that a deed from St. John to Brown may be decreed to be fraudulent and void, and delivered up to be cancelled, or that Brown be adjudged to be a trustee for the said Elder, or the complainant, and be compelled to convey to Elder; and that the action of ejectment may be perpetually enjoined.

The defendants answered the bill, but it is unnecessary to set forth their answers.

At the March Term, 1854, of said Superior Court of said county, a trial was had on the bill and answers.

The complainants offered, in evidence, an exemplification of an ejectment case pending in said Court. To which defendant objected, on the ground "that there was no exhibit of the same to the bill." The Court sustained the objection, but allowed complainant to amend his bill, by attaching the said exemplification as an exhibit, to which defendant objected, unless complainants showed special cause for it. Complainant showed no cause, "that when the bill was filed, it was not the practice of the Circuit, to make such averments in bills in Equity."

Defendant then moved the Court to make Sterling Elder, the party in possession, a party complainant with Redwyne, his grantor; to which complainant objected. The Court sustained the motion, and Elder was made a party complainant. Complainants then offered, in evidence, a deed from Redwyne to David Dominick, to which defendants objected, because the same was not attached as an exhibit to the bill. The Court sustained the objection, but allowed complainants to amend their bill in this respect, on the ground that Elder had, at the

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instance of defendants, been made a party complainant, and said deed was a link in Elder's chain of title to the land, and defendants excepted.

Complainants then offered in evidence, a deed from Wm. B. Shell, as administrator of David Dominick, to Sterling J. Elder, to which defendants objected on the same ground. The Court sustained the objection, but allowed complainants to amend their bill, by attaching said deed as an exhibit, and defendants excepted. Defendants further objected to the introduction of said deed, because it was an administrator's deed, and his authority to sell must first be shown. The Court sustained the objection, when complainants tendered in evidence two orders; one purporting to be an order from the Court of Ordinary of Coweta County, appointing Shell administrator of Dominick; the other calling him "administrator on the estate of David Dominick, deceased," and granting him leave, as such administrator, to sell the real estate of Dominick, after reciting the usual notice of application for leave to sell, &c. To the first order defendants objected, because the minutes of the term of the Court of Ordinary, at which said order was granted, was not signed by said Court, as required by law. The Court sustained the objection, and ruled out the order. The defendants also objected to the second order, because the first order being ruled out, there was no evidence of the appointment of Shell, administrator of Dominick. The Court over-ruled the objection, and admitted the order in evidence; and this was excepted to by the defendant. Defendant then objected to the administrator's deed, because, first, "it did not appear, in said deed, that the administrator had given the legal notice for application for leave to sell." 2d. "It did not appear, from the deed, that the sale of the land had been advertised at the Court-house door in Coweta county."

The Court over-ruled the first objection, and defendant excepted.

Complainants then introduced Richard M. Hackney, who testified, "that to the best of his recollection, he saw, before the sale, on the Court-house door, an advertisement of the sale

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by the administrator." Defendant objected to the evidence. The Court over-ruled the objection, and allowed the deed to be read to the Jury, stating, "that whether the sale was advertised, was a fact, which, under the evidence, he would leave to the Jury." To all of which rulings by the Court, defendants excepted. The Court, among other things, charged the Jury, in substance, that if they believed the land was granted by the State to St. John, and that all the intermediate deeds, down to Sterling J. Ekler, were genuine, and regularly executed, they should find a decree for the complainants; for in that event, Ekler would have a complete legal title to the land; and in that case, they should decree that the Common Law action should be perpetually enjoined.

The defendants requested the Court to charge the Jury, "that a decree of perpetual injunction cannot be made in this case, inasmuch as there has been but one action of ejectment instituted by defendants for the recovery of the land." Upon which, the Court charged, "that if this objection existed, it should have been taken advantage of by demurrer, or at least at an earlier stage of the case, and that it is now too late to insist upon it." The Court further charged the Jury, "that if they believed, from the evidence, that St. John, through mistake or fraud, by Madden or any one else, executed the deed in evidence to Madden, though he may have intended, at the time, to have executed his bond for titles to the land, and they should believe that the deed from Madden to Taylor is genuine: provided these facts are alleged in the bill, and sufficiently proven, and they should believe, from the evidence, that Perry, John and Lewis Redwyne, nor either of them had any notice of such mistake or fraud, but were *bona fide* purchasers for a valuable consideration, that they should find for the complainants. To which charges, Counsel for defendant excepted.

The Jury found and returned into Court, on Saturday night, about the hour of 9 o'clock, a verdict in favor of complainants. Whereupon, Counsel for defendants notified the Court of their intention to file a rule *nisi* for a new trial, and asked the Court to prolong the session of the Court to the hour of mid-

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night, (when that term of the Court expired by operation of law) to give them an opportunity to make out and file said rule; which the Court refused to do, and adjourned the Court, and; defendants excepted and on these several exceptions, have assigned error.

BUCHANAN & MCKINLEY, for plaintiff in error.

DOUGHERTY & FREEMAN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

What is an "exhibit?" Is it a thing belonging to pleading or to evidence? It is said, in 1 *Daniel's Ch. Pr.* 475-6, *Marg.* "that in stating deeds or other written instruments in a bill, it is usual to refer to the instrument, itself, in some such words as the following, viz: 'as in and by the said indenture, reference being thereunto had when produced, will more fully and at large appear'. The effect of such a reference, is to make the whole document referred to, part of the record. It is to be observed, that it does not make it evidence; in order to make a document evidence, it must, if not admitted, be proved in the usual way; but the effect of referring to it is, to enable the plaintiff to rely upon every part of the instrument, and to prevent his being precluded from availing himself, at the hearing of any portion, either of its recital or operative part, which may not be inserted in the bill, or which may be inaccurately set out. Thus, it seems that a plaintiff may, by his bill, state simply the date and general purport of the deed under which he claims, and that such statement, provided it be accompanied by a reference to the deed itself, will be sufficient".

It is this sort of a reference to a writing, which makes the writing become an exhibit.

The sole office, then, of an exhibit—of making a writing become an exhibit, is to help out a pleading—to help out allegations in a bill or answer, in case it should be found,

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on the trial, that such allegations do not give some needed particulars of the writing, or do not give the writing with accuracy. It is no part of that office to convert into evidence the writing made an exhibit of, or to be a pre-requisite to the admission of the writing as evidence. If the writing is made an exhibit of, still, it must (unless admitted) be proved, if proved, but not made an exhibit of; still, if in itself legal, and if adapted to the allegations, such as they may be, it is to be received as evidence.

This is what an exhibit is by the law of England—by that law, as it was when adopted by Georgia. Is it any thing different, by the law of Georgia, as that law now stands?

The *Seventeenth Equity Rule* says, that "copies of all deeds, writings and other exhibits, shall be filed with the bill or answer, and no other exhibits shall be admitted, unless by order of the Court, for some special and good cause shown". "No other exhibits shall be *admitted*"—how admitted? As evidence? As *evidence*, no writings, even before the making of this rule, as we have seen, could, by virtue merely of having been made exhibits of, be admitted; neither writings, of which copies might have been filed, nor those of which copies might not have been filed. To make these words, therefore, mean to say, that writings, of which no copies have been filed, shall not, although referred to as exhibits, be evidence, is to make them mean to say what already stood, said by the general law. What, then, do the words mean? This: No writings shall be "admitted", received, considered as exhibits—shall be allowed to do the office of exhibits, except those of which copies may have been filed: whereas, the old rule had said, that any writing might be made a part of a bill, by being properly referred to, without being copied into the bill; this, the new rule, says that no writing shall, however referred to, become a part of bill or answer, without a copy of it has been filed with the bill or answer.

Thus, the new rule is but the old rule, a little contracted.

This being so, if, in bill or answer, the pleader refers to a writing, and professes to file a copy of it, but does not file one,

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the omission is a defect in *pleading*, if defect at all—a defect by which he *may* fail to get all the benefit from the writing, which, had a copy been filed, he might have got—a defect by which he *will* fail to get all that benefit, if, in setting out the writing, so far as he has set it out, he has set it out inaccurately, or has not set out some parts of it which he needs : and thus, being a defect in pleading, when the writing, that of which no copy has been filed, comes to be offered as evidence, the only questions will be, does the writing fit the descriptive allegation ? may the whole and every part of the writing be contained in the allegation, or only some part of it be so contained ? has there been accuracy in the description ? If yes may be answered to these questions, the writing is to be read as evidence—all of the writing, if, as to all of it, the descriptive allegation is good—part only, if, as to part only, that allegation is good.

Now, in the bill in this case, there were allegations to the effect, that St. John & Brown were, in the name of St. John, in Coweta Superior Court, prosecuting an action of ejectment against the complainers in the bill, Redwyne & Elder ; that Redwyne had made a deed for the land to Dominick ; that Shell, as administrator of Dominick, regularly sold and conveyed the land to Elder : but no copy of the ejectment or of either of these deeds, was filed with the bill ; and merely for that omission, the originals were considered by the Court not to be admissible as evidence. But, as we have seen, the admission or rejection of the originals should have been made to turn upon another thing, namely : the nature of the allegations—the allegations aforesaid. And looking to the nature of the allegations, it was such as to make the originals admissible. The allegations were such as to be in the spirit of Lord *Coventry's* order, “ that bills, answers, replications and rejoinders, be not stuffed with repetitions of deeds or writings, in *haec verba*, but the effect and substance of so much of them, only, as is pertinent and material to be set down, and that in brief and effectual terms”. (1 *Dial. Ch. Pr.* 469, *marg.*) Such “stuffing” is expensive and otherwise hurtful. Not a single reason is appa-

rent, why copies of these originals should have been added to the general allegations aforesaid, which give their "effect and substance".

The Court, therefore, if so inclined, might, under these allegations, well have admitted the originals as evidence. This the Court would not do, but as a pre-requisite to their admission, required the complainants to amend their bill, by filing copies of the originals. This was an error, of which the *complainants* had the right to complain; but it was the *defendants* that made the complaint. The defendants excepted to the decision allowing this amendment to be made. They insisted, that in the stage in which the case then was, the case being before the Jury, such amendments could not be made. But a plaintiff "may, after replication has been filed, and the cause is at issue, have leave to amend his bill, and this even after witnesses have been examined in the cause and publication passed". (1 *Daniell's Ch. Pr.* 544, *marg.*)

And the Act of the last Legislature, "to change and simplify the practice and pleadings in this State," &c. among other things, declares that "parties, plaintiffs and defendants," "whether at Law or in Equity, may, in any stage of the cause, amend their pleadings in all respects, whether in matter of form or matter of substance".

[1.] In allowing the amendments, therefore, the Court did nothing which, as against the *defendants* in the bill, was wrong.

The order of the Court of Ordinary, granting Shell leave to sell the land, called him the "administrator on the estate of David Dominick", and it recited that he had "given notice, in terms of the law, that he would apply to" that "Court, for an order to sell all the real estate", &c.

[2.] This order, the Court was right, as we think, in holding to be sufficient *prima facie* evidence of the appointment of Shell as administrator.

It is not to be presumed by one Court, that another, concerning matters over which that other has jurisdiction, and in a usual sort of proceeding touching such matters, recites, as true, things which are not true: rather, that it recites only such

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things as are true, is, in the first instance, to be presumed. Is the Court of Ordinary such a Court as not to be entitled to the benefit of a principle so obvious? If it is, what makes it such? Its being a Court of limited jurisdiction? Speaking for myself, I must say that I know of nothing sufficient, on *this* account, to make the Court of Ordinary a Court not entitled to the benefit of such a presumption, that is not equally sufficient to make the Superior Court a Court not entitled to the benefit of the same sort of a presumption. And in this, I think myself supported by much of what was said, if not by what was done, in *Tucker vs. Harris*, (13 Ga. R. 1.) The Superior Court, itself, has limits to its jurisdiction.

I may, in like manner, say that I am not aware of any law, which makes the minutes of the Superior and Inferior Courts void, if not signed by the respective Judges of those Courts. Certainly the Act which requires such minutes to be so signed, does not say the omission to sign is to render void the minutes. To keep the minutes, is made the duty of the Clerks, not that of the Judges. These minutes, thus kept, the Judges, it is true, are commanded to sign; but should they disobey the command, is the penalty, if any, to fall on them who are the guilty, or upon suitors who are the innocent? If not upon them, what inducement have they to obey the command, if upon the suitors? Whence are they to get their reparation? How easy to have said, "and unless so signed, the minutes shall be void". But this the Legislature did not say. What warrant, then, have Courts to say it? (*Pr. Dig.* 428.)

The objections to the admission of the deed of Shell, as administrator, were—First, That it did not appear, from the deed, that the administrator had given notice of his intended application for leave to sell. Second, That it did not appear, from the deed, that the sale of the land had been advertised at the Court-house door.

[3.] As to the first of these objections to it, the order for leave to sell, with its recitals, was an answer; for among those recitals, is one to the effect that Shell, the administrator, "in terms of the law", had given notice of such, his intended appli-

ation. Being contained in the order, and the order being in evidence, it was not necessary that this recital should also be contained in the deed, to make the deed admissible as evidence.

As to the second, the testimony of Hackney was an answer to it.

To preserve a notice of this sort, stuck on a Court-house door, after the day of sale has passed, whose duty is it? Must it not be torn off the door, to make room for other notices and advertisements, that the law is every day requiring to be put here? The presumption is, that such a notice, as soon as it is discharged its office, perishes.

[4.] That being presumed, in this case, Hackney's testimony, as to the contents of the notice, &c. was at once admissible. And having been admitted, it was sufficient, as we think, to warrant the introduction of the deed as evidence. And the Courts leaving the question of the sufficiency of Hackney's testimony to the Jury, if wrong, was wrong merely in giving the defendants more than they were entitled to. We do not, however, say we think it to have been wrong. As to that, we say nothing.

The Court being requested to charge the Jury, "that a decree of perpetual injunction" could not be made in the case, "inasmuch as there" had "been but one action of ejectment instituted by defendants, for the recovery of the land", charged "that if this objection existed, it should have been taken advantage of by demurrer, or at least, at an earlier stage of the case, and that it" was then "too late to insist upon it".

Was this right? The Court seems to admit, that if a demurrer had been filed to the bill, on the ground stated in the request to charge, the demurrer must have been sustained.

The Court denies, however, that the ground had any virtue in it, at the late stage of the cause, when the ground was brought to the notice of the Court—the stage when the Court was in the act of charging the Jury.

Mitford says: "actions of ejectment having become the usual mode of trying titles at the Common Law; and judgments in those actions not being in any degree conclusive, the

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Courts of Equity have interfered; and after repeated trials and satisfactory determinations of questions, have granted perpetual injunctions to restrain further litigation; and thus have, in some degree, put that restraint upon litigation, which is the policy of the Common Law, in the case of real actions". And he cites many cases in support of this proposition. (*Mitford's Eq.* 144 and note x.)

It appears, therefore, that Courts of Equity "have interfered, and after repeated trials and satisfactory determinations of questions, have granted perpetual injunctions to restrain further litigation; but it does not appear that they have ever interfered, before there has been such trials, or something, in the estimation of those Courts, equivalent to such trials. And it is now too late for them to begin—at least, it is in Georgia—a State which, by its Constitution, has fenced off its Courts from whatever is legislative territory. But if the Courts had the power to enlarge this much questioned—most questionable branch of Equity jurisdiction, ought they to have the will? When A asks a Court to command—"enjoin" B not to sue him, A—to command B not to go into any of the Courts, though open to all men, and complain of him, A, saying but barely this: "A has done me an injury. May it please the Court to command A to repair that injury, or show cause why he will not"—asks a Court to command B not to do towards him, A, what the law says every man may do towards every other man—asks a Court to suspend, in his favor, a law of the land, is it too much for the Court, before granting the request, to require of him, A, to show, beyond the shadow of a doubt, that by the granting of the request, it will hardly be possible for any harm to come to B, whilst to him, A, it will be certain that some, perhaps much, good will come? Too much to require of him to show B to have repeatedly made that same complaint against him, A, and the complaint, as repeatedly to have been fairly and fully tried, and every time with the same result—a verdict in his, A's favor: and thus, to show that the complaint, if allowed to be persisted in and pressed to a trial, would, of necessity almost, result in the same sort of a verdict.

[5.] More to be shown than this, if as much as this is not required by the aforesaid rule, taken from *Mitford*. That rule seems to have been admitted to be true, as a general rule, by the Court below: but that Court considered it, not to justify the objection in this case, because the objection, in the opinion of the Court, came too late—came not until the Court was in the act of charging the Jury. Did the objection then come too late?

The general rule is thus stated by *Mitford*: “In general, if a demurrer would hold to a bill, the Court, though the defendant answers, will not grant relief.” (*Mit. Plea.* 130.) In *Bond vs. Murdock et al.* (10 *Ga. R.* 395,) a case, in many respects not unlike this, the rule as thus stated, was, by this Court, acted on. In that case, after the coming in of the answer, the bill was, on motion, dismissed for the want of equity, and the want of equity consisted in this, that the complainant, who was seeking to enjoin an ejectment, had never had in his favor a verdict in ejectment.

And, indeed, it may be well asked, if a Court has no jurisdiction of a case, will not its judgment in the case be worthless? The sooner, therefore, it gets rid of such a case the better. It follows, that in whatever stage of a case the objection, for want of jurisdiction, is taken, it is better to sustain it then, in that stage, than to let the case go on and end, at last, in a worthless judgment.

[6.] In this case, then, the objection did *not* come too late. The Court should have charged on this point, as it was requested to do.

And if the Court should so have charged the Jury, it ought not to have charged them that they might find for the complainants, should they believe the allegations in the bill to have been proved: that is, might, according to the prayer of the bill, perpetually enjoin the defendants from suing the plaintiffs in ejectment. In no event, as the case stood—stood without the existence of as much as one final verdict in ejectment in favor of the complainants, could the Jury have been justified in rendering such a verdict as that. The fact, if fact it was, that the

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deed of St. John to Madden, was made by St. John acting under the belief, that in making the deed, he was only making a bond for titles, instead of a deed—acting in this belief, by mistake, accident or the fraud of Taylor or Madden, could not avail to give the claimants, under that deed, a better right to a perpetual injunction, than the fact, if such had been the fact, that this deed was, beyond question, a good deed—the genuine intended deed of St. John, could have availed to give them such a right. And to give such a right, a deed of the latter sort, without the help of recoveries in ejectment, would not, as we have seen, have been sufficient. If a good deed would not be sufficient, much less would a deed not good, be sufficient.

Was there, then, no equity in this bill? The bill was not wholly without equity. It is alleged in it, that the witnesses to the deed from St. John to Madden, are dead, and that the complainants cannot adduce proof of its execution, without appealing to the conscience of St. John. That deed is a necessary link in the chain of the complainants—a link, without which they cannot defend the suit in ejectment. They have a right, then, to ask equity to mend the broken link; to ask equity to put that deed in a condition in which they may use it in their defence, at Law, against the ejectment—to ask equity to declare or decree that deed to be the deed of St. John; and until such decree, to enjoin the Common Law suit. Armed with this decree, they will be as well armed to go into the defence of the Common Law suit, as they would be, were the witnesses to the deed alive and within reach. And this is all the equity they have.

And the Court, instead of telling the Jury what it did, should have told them that the only relief which they could give the complainants, if, by the evidence, they could give them any, would be to find this deed—this alleged deed—to be the deed of St. John.

No. 13.—PLEASANT H. WHITAKER, claimant, plaintiff in error, vs. ELIZABETH STRONG, for use, &c. defendant in error.

- [1.] The 2d section of the Act of 1806, regulating divorces, applies only to conditional or partial, and the 3d section, to total or absolute divorces.
- [2.] The 2d section of the Divorce Act of 1806, was intended to substitute a remedy, at Common Law, for granting divorces from bed and board, similar to that which is provided in the English Ecclesiastical Courts.
- [3.] In cases of partial divorce, no lien is created on the husband's property, until the rendition of the judgment or decree.
- [4.] Two concurrent verdicts are not necessary, in cases of conditional divorce.
- [5.] Under the old Constitution, no Legislative interposition was required, in cases of conditional divorce; but the action of the Court, alone, was final and conclusive.

Claim, in Heard Superior Court. Tried before Judge WARREN, May Term, 1854.

In April, 1845, Elizabeth Strong filed her libel for a divorce, "*a mensa et thoro*", against her husband, Creed T. Strong, in Heard Superior Court, alleging, as the ground therefore, cruelty towards plaintiff, on the part of the said Strong. No schedule of property was filed with the declaration. In January, 1846, she filed a schedule, setting forth the property of plaintiff and defendant, in general terms; and on the list, were four negroes, valued at \$1500. In January, 1847, Strong sold the negroes to Whitaker, the claimant. In July, 1847, Mrs. Strong filed an amended schedule, setting forth the names and value of each of the negroes. At the October Term, 1848, of said Court, the first verdict was rendered in favor of plaintiff, granting her a partial divorce, and specifying the property she was entitled to receive. At the October Term, 1849, a second verdict was had, concurrent with the first, as to the separation, but not as to the amount of property decreed to the plaintiff. The verdict was as follows: "We, the Jury, find and decree that sufficient proofs have been submitted to our consideration, to authorize a partial divorce of the parties; that

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is, a divorce "*a mensa et thoro*"; that the plaintiff do have and recover of the defendant, the amount he has received of the plaintiff's father's estate; and we find and decree that each of the two children have and recover of defendant, Four Hundred and Fifty Dollars, out of the property of defendant, after the payment of his just debts," &c.

On this verdict, a judgment was entered up and execution issued thereon, for the sum of \$900, on the 1st day of November, 1849, which execution was levied, on the 19th December, 1849, on three of the four negroes returned in the schedule, and sold by Strong to Whitaker; and on the same day, Whitaker interposed his claim to the said negroes.

The claim came on to be tried, at the November Term, 1852, of said Court, when much testimony was introduced, but which it is unnecessary here to set forth. The Jury found three negroes, to-wit: Harriet and her two children, subject to the *fi. fa.*: Whereupon, Counsel for the claimant moved the Court for a new trial, upon the following, among other grounds: Because the Court held and charged the Jury, "that the defendant's property was bound to answer the judgment of the Court, from the time of the filing the petition for divorce, provided a schedule was also filed, of the property of the defendant, which he owned and possessed, at the time of the application for divorce; and that defendant could not sell and convey such property, even to a *bona fide* purchaser, for a valuable consideration, so as to defeat the lien; and that the pendency of the suit with a certain schedule, was sufficient notice to make voidable any such sale, as far as the rights of the plaintiff and her children were concerned." The Court refused to award a new trial, and claimant excepted.

SIMS & HAMMOND, for plaintiff in error.

FEATHERSTONE, for defendant.

By the Court.—LEMPKIN J. delivering the opinion.

This is a proceeding under our Divorce Act of 1806, and requires an exposition of that Act, by this Court. It is as follows:

"Sec. I. The divorces recognized by this Act, shall be absolute, and totally dissolve the marriage contract; or conditionally, and only separate the parties from bed and board, and provide for separate maintenance and support of the parties and their issue.

"Sec. II. All cases of divorce, which shall come before the Superior Court, shall be tried by a special Jury, who shall inquire into the situation of the parties, before their intermarriage, and also at the time of trial, and in all cases where they shall determine in favor of a conditional divorce, they shall, by their verdict or decree, make provision out of the property of which the husband may be possessed, for the separate maintenance and support of the wife, and the issue of such marriage, which verdict or decree, the said Court shall cause to be carried into effect, according to the rules of Law, or according to the practice of Chancery, as the nature of the case may require.

"Sec. III. In all cases where the verdict shall be for an absolute divorce, the party whose improper or criminal conduct shall authorize such divorce, shall not be permitted to marry again during the life of the other party, and in case of such second marriage, the party so offending shall be subject to the pains and penalties enacted against bigamy: Provided, always, that where the marriage is declared void, for such causes existing before such intermarriage, as are recognized by the Ecclesiastical Courts, the said parties may again marry: any thing herein contained, to the contrary, notwithstanding.

"Sec. IV. In all cases where the Special Jury shall have brought in a verdict for an absolute divorce, and the General Assembly shall refuse to pass a law to carry the same into complete effect, it shall be lawful for either party to apply to the Superior Court of said county, after giving thirty days notice, in writing, of such application, to the adverse party, if within the State, and if out of the State, three months notice, in one of the public Gazettes; and it shall be the duty of such Court to appoint three commissioners, who shall inquire into the situation of the parties, before their intermarriage, and also at the

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time of such inquiry; and shall determine upon the support or provision which may be necessary for the separate maintenance of the wife, having due regard to her situation before marriage, and also the situation of the husband at the time of such inquiry; and the said three commissioners, before they proceed to make the inquiry, shall take and subscribe, before one of the Justices of the Inferior Court, or Justices of the Peace of the county, the following oath or affirmation, viz:

‘I, A. B. do solemnly swear or affirm, that I will, without prejudice or partiality, faithfully inquire, and justly decide upon the case now submitted to me, and that I will make my report or decree thereon, according to the principles of justice and equity, to the best of my skill and understanding, so help me God.’ And it shall be the duty of such commissioners to report their decision or decree in the premises, to the next Superior Court of the county aforesaid, which shall cause the same to be entered as the judgment of said Court, subject, nevertheless, to be altered or modified by the said Court, provided application be made to the next Superior Court of said county, for that purpose, stating the grounds upon which such application is founded; and in such case, it shall be the duty of the said Superior Court, to refer the said decree or report, to the same commissioners, with two additional commissioners, who shall take the oath herein before prescribed, and shall proceed to re-examine the said decree, and report their decision or decree in the premises, to the next Superior Court of said county; which shall be entered as the judgment or decree of said Court.

“Sec. V. All commissioners appointed under and by virtue of this Act, shall have power to compel the attendance of such witnesses as may be deemed necessary by the parties, before them, at such time and place as they may appoint for their meeting, and shall also have competent power and authority to administer an oath to such witnesses, and shall take down the testimony of such witnesses in writing, which shall be annexed to their decree, and deposited in the Clerk’s office.

“Sec. VI. In all cases where provision is made for the

separate maintenance of the wife, according to the provisions of this act, the husband shall not be subject to any contract, made thereafter by such wife, but in all and every such case, the wife shall be subject to the payment of her own debts, out of her separate maintenance, during the time that such separation and separate maintenance shall continue.

"Sec. VII. In all cases of divorce, the issue of such marriage shall not be bastardized, but shall be capable of taking, by descent or distribution, from either of their said parents.

"Sec. VIII. In all cases of application for a divorce, the party applying, shall render a schedule, on oath, of the property owned or possessed by said parties, at the time of such application; or, if the parties have separated, at the time of such separation, which shall be filed of record by the Clerk of the Superior Court, and after all just debts shall be paid, shall be subject to a division or equal distribution, between the children of such parties, except the Jury, before whom the same may be tried, shall think proper to allow either party a part thereof." (*Prince's Digest*, 188.)

The 4th, 5th and 6th sections of the Act of 1806, to which I have already referred, authorize commissioners to provide alimony for the wife, when the Legislature refused to ratify a *total divorce*. No provision is made, however, when a *partial divorce* is not affirmed. The inference is plain—*partial divorces* were never submitted to the Legislature; and if not, then the 2d verdict, which is to be obtained under the Constitution of 1833, does not apply to partial divorces, notwithstanding the intimation of Mr. *Prince* and the practice of the Courts to the contrary.

It will be remembered, that under the previous Statute of 1802, all divorces were total. The Act of 1806 makes provision for both absolute and conditional divorces.

[1.] There is an apparent conflict, I admit, between the 2d and 8th sections of the Act of 1806. It is our duty to reconcile them, if we can. The Legislature did not mean that any portion of this or any other Statute, should be inoperative. Its design, beyond all question, is not to be defeated, if it can be.

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helped—*verba debent intelligi cum effectu*. Full sense and meaning should be given to every clause and provision, of every Act of the Assembly, and no part made void, if possible. But if this be impossible, we must say which shall stand and which fall. We believe that all parts of the Act can be enforced, upon the ground that the 2d section applies to *partial*, and the 8th to *total* divorces. Manifestly, they cannot both apply to the same proceeding. In the one, the Jury are to take into consideration the condition of the parties, before their intermarriage, and the estate of the husband, at the time of the trial. In the other, the time when the schedule is to be filed, indicates, clearly, the time, as to property, at which the inquiry of the Jury is to be directed, namely: when the libel is filed, or when the separation took place.

But what shows, still more conclusively, that these two enactments relate to different proceedings, is this: under the 2d section, the Jury, by their verdict, are to make suitable provision for the support of the wife and children: whereas, under the 8th section, the direction is, to give the whole of the property to the children, unless the Jury shall see fit to assign a part to the husband and wife.

[2.] We conclude, then, that the 2d section applies to conditional divorces only; and that cases of this sort are to be controlled and regulated according to the terms of this section. And it will be discovered, that by the 2d section of the Act, a remedy at Common Law was intended to be substituted and provided, for a similar proceeding in the Ecclesiastical Courts in England. In addition to the decree of separation from bed and board, that Court proceeded to award alimony; and to enforce the decree for alimony, the Common Law, as well as the Chancery Courts, but more especially the latter, would lend their assistance. Hence, the clause in this 2d section, that the decree of the Jury for support and maintenance, (which is alimony) is to be enforced according to the rules of Law, and the practice in Chancery.

[3.] If we are right then, in this view of the Statute, there was no lien created on the defendant's property, until the judg-

ment was rendered. Up to that period, like any other free-man, he had the right to dispose of the whole or any portion of his property, to whomsoever he pleased, provided the conveyance was not fraudulent, and made to hinder and defeat the finding for alimony, which might be made by the Jury against him. If the husband, *bona fide*, sell his property, it is to be presumed that he has received, in lieu thereof, its representative, in value. The husband has got to live, after the separation, as well as the wife, for whom he has to provide. He is not likely, therefore, to waste or destroy his property. But should he threaten to do so, or remove beyond the jurisdiction of the Court, the remedy, by bill of *quia timet* or writ of *ne exeat*, are both at the command of the wife, and are ample for her security.

In confirmation of the view we have taken of the true intent and meaning of the 2d section of the Act of 1806, if, indeed, it needed confirmation, I would refer to some of the other sections. Sections 4th, 5th and 6th contemplated a case where an absolute divorce could not be obtained, on account of the failure of the Legislature to ratify the action of the Court, under the old Constitution. Under these sections, a provision was authorized to be made for the wife, precisely similar to that under the 2d section. And it will be seen, that in order to fix the amount of the allowance, the commissioners are to direct their investigations, as to the condition of the husband, to the time at which their inquiry is made, viz: at the time of trial.

So far, then, as the proceeding for a partial divorce is concerned, it is unnecessary to file a schedule; and that if it be filed, it creates no lien; for whether it be necessary to file it or not, or whether it be actually filed or not, still, the Jury, in such cases, must, under the law, limit their inquiry to the condition of the parties before intermarriage, for the purpose of ascertaining what portion of the property came by the husband, and what by the wife; and having made this preliminary examination, out of such estate as the husband has, at the time of the trial, suitable provision is to be made, for the use and maintenance of the wife and children.

It is needless to consider the several rulings of the Court in detail. In the opinion of this Court, there is error in the whole of them, so far as they assume that the lien created on the property of the defendant, was from the filing of the schedule, instead of the date of the decree. And the decrees, first and last, (for there were two of them,) being both subsequent to the sale to Whitaker, by Strong, the purchase of the negroes of the defendant, can only be set aside for fraud or some other such cause.

[4.] Had we taken a different view of this point, then it would have become necessary to consider whether partial divorces require two concurrent verdicts; for it will be observed, that the levy made on the property in controversy, was by virtue of an execution issuing on the second or last judgment.

For myself, I am perfectly satisfied, and I believe my brethren concur with me, that two verdicts are neither required nor authorized, in cases of conditional divorce. And that the second verdict comes under the amended Constitution of 1833, in lieu of the Legislative ratification of the single verdict, in cases of absolute divorce, before the change in the Constitution was made.

[5.] During the two years that I served in the Legislature—1824, 1825—numerous applications for divorces came before the General Assembly, and not one of them, I am sure, were from bed and board; and, I am informed by the oldest members of the bar, gentlemen whose *professional* memory runs back to the year when the Act of 1806 was passed, that such a thing as invoking Legislative aid, to render valid partial divorces, was never heard of. One verdict was deemed final and conclusive, in all such cases.

Divorces, under the Act of 1802, as already remarked, were all total; and hence the reference, in the preamble of that Act, to Legislative interposition.

What was the mischief which gave rise to the amendment of 1833? The preamble discloses it: "Whereas, the frequent, numerous and repeated applications to the Legislature, to grant divorces, has become a great annoyance to that body, and is

well worthy their attention, as well on account of the expense consequent on said applications, as the unnecessarily swelling the Laws and Journals; and believing that the public good would be as much promoted, and that the parties would receive full and complete justice: *Be it enacted,* &c.

But partial divorces were not within the evil complained of, and consequently, are not within the remedy provided by this amendment.

But the very terms of the amendment, itself, are conclusive upon the subject: "Divorces shall be final and conclusive, when the parties shall have obtained the concurrent verdicts of two Special Juries, authorizing a divorce, upon *legal principles*." This technical phraseology, "legal principles", both under the old and amended Constitution, has always been held to mean such principles as would authorize total divorces, at Common Law: in other words, neither the 9th section of the 3d article of the Constitution of 1798, nor the amendment of 1833, had any reference, whatever, to conditional divorces.

No. 14.—THE JUSTICES OF THE INFERIOR COURT OF HEARD COUNTY, plaintiffs in error vs. JOHN J. CHAPMAN and ANDERSON CHAPMAN, defendants in error.

[1.] A bastardy bond is intended for the protection of a county, *as a county*; and there is no breach of it until the child has become chargeable to the county.

[2.] By our Poor Law system, the Justices of the Inferior Court have the right to inquire into the circumstances of the poor, to elect whom they will treat as a pauper, and who shall become chargeable to the county; and until it has done so, by some act or order, no person can properly be said to be thus chargeable.

[3.] The proper evidence that a bastard child has become chargeable to the County, is to be found in the payment, by the Inferior Court, of expenses,

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after refusal or failure of the putative father to pay the same, on account of the lying in of the mother, or the maintenance of the child; or the granting of an order for such payment.

Debt on bond. Demurrer to the petition in Heard Superior Court. Decided by Judge WARNER, May Term, 1854.

This was an action of debt, brought by the Justices of the Inferior Court of Heard County, against the defendants, on a bastardy bond. The petition, among other things, set forth that the defendants entered into said bond on a certain day specified, and duly and legally executed the same, by which they bound themselves to the plaintiffs, in the sum of Six Hundred and Forty-two Dollars, Eighty-five and Three-fourth Cents, to which said bond the following condition was annexed: "The condition of the above bond is such, that whereas the above bound John J. Chapman stands charged with being the reputed father of a bastard child, of which Mary Ann Formby is now pregnant. Now, if the said John J. Chapman shall, from time to time, and at all times hereafter, acquit, discharge and indemnify, and save harmless the said Justices and the inhabitants of said county, from all costs, charges and trouble, for and by reason of the lying in of the said Mary Ann with, and of the birth, maintenance of and bringing up said child, or of and from all suits, charges and demands whatsoever, touching and concerning the same, then the above obligation to be void, otherwise in full force." The said petition then goes on to allege, that Mary Ann Formby is a free, white single woman, and "that the said Mary Ann, since the execution and delivery of the said writing obligatory, in consequence of her said pregnancy, has been confined and lay in, sick, for a long space of time, and gave birth to the said bastard child during her said confinement; and that the said Mary Ann, during the time aforesaid, was sorely sick at the house of Picasant A. Formby, who is an inhabitant of this county; and that the said Mary Ann, while sick at the house of the said Picasant, was a great charge, expense and trouble to the said

Pleasant, in this—that the said Pleasant had to nurse, sit up with, employ medical aid, and pay physician's bills, hire nurses, and do many other acts, and expend a large sum of money, to-wit: the sum of One Hundred Dollars, of heavy expense to him, the said Pleasant A. And your petitioners aver, that they, as Justices of the Inferior Court, have been presented with large medical bills, and with bills for nursing, boarding and clothing the said bastard child, and with the expense of nursing, boarding and lying in of the said Mary Ann; and that the said John J. has not well and truly performed his said obligations, because he has refused to pay the above bills and charges; and that the said Anderson Chapman has not done so for him; and that they, the said defendants, have committed a breach of said bond in this—that the said John J. Chapman did not, at the time of executing said bond, nor at any other time, acquit, discharge, and save harmless your petitioners, nor the inhabitants of said County, from all costs, charges and trouble, by reason of said lying in, &c. whereby an action hath accrued to your petitioners," &c.

Counsel for the defendants demurred to the said petition, and moved to dismiss the same, "because it did not appear, from the declaration, that the County had become chargeable, or was liable to become chargeable, for the support, maintenance or education of said bastard child, or expenses of the lying in of the mother, in giving birth to the said bastard child, by the actual payment by the Inferior Court, of any moneys disbursed on that account, or the passing of any orders for the disbursement of any county funds for that purpose, or any liability or undertaking of the Court to pay and disburse any county funds for that purpose."

Which demurrer the Court sustained, and Counsel for plaintiff excepted.

WRIGHT & FEATHERSTONE, for plaintiffs in error.

MABBY, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] It would seem, from the terms of this bond, and the language of the petition, to have been the impression of the petitioners, the Justices of the Inferior Court of Heard County, that the bastardy bond is given for the protection or benefit of private citizens of the county, who may incur expenditures on account of the lying in of the mother, and the maintenance of the child, as well as for the protection of the county, generally, as represented by the Inferior Court. That is to say, the intention of the Legislature was, that suit should be brought on such bond by the Inferior Court, as well for the use of any private person, incurring such expenses, as for the Court itself, representing the County. This appears to be so, because this bond has been so written as to make the defendants undertake to save, harmless from all costs, &c. not only the Court, but also "the inhabitants of the county." And in alleging a breach of the bond, the pleader evidently goes upon the idea, that the same has been forfeited, because Pleasant Formby, whom he declares was one of the inhabitants of the county, had incurred costs and charges in this behalf, which the defendants had refused to pay.

Now, our construction of the Statutes, in such case made and provided, is that the bond was intended for the protection, only, of the county, *as a county*. That it was designed to keep the child out of that class of paupers for which the authorities of the county might feel themselves under obligations to provide, and which may be said to be liable to become chargeable to the county. And this construction seems plainly authorized by the language of the Statutes.

The act of December 16, 1793, provides, that "any Justice of the Peace, who, of his own knowledge, or upon information on oath, &c. of any free white woman having a bastard child, or being pregnant with one, which it is probable will become chargeable to the county, may issue a warrant for the arrest of the mother, and require bond, in the sum of 150*l*, with security,

for the support and education of such child or children, till the age of 14, unless the mother shall discover the father of such child or children." In which case, the Act requires a warrant to be issued for the arrest of the father, and that he shall be required to give bond, with security, "for the maintenance and education of such child or children, until they arrive at the age of 14; and also the expenses of lying in with such child or children, boarding, nursing and maintenance, while the mother of such child is confined by reason thereof."

The Act of 1809 declares, that "it shall be lawful for the Inferior Courts of this State, when any child or children have or shall become chargeable to the county, where bonds are taken, or hereafter to be taken, in conformity to an Act passed the 16th day of December, 1793, for the maintenance of bastard children, to institute an action on all bonds so taken or hereafter to be taken, in manner aforesaid, and prosecute the same to judgment; and it shall be lawful for them to recover the full amount of said bond or bonds; which judgment or judgments shall remain open, and be subject to be appropriated by the Courts aforesaid, from time to time, as the situation and exigencies of the said bastard child or children may require".

It will be perceived, that in the first of these Acts, the Legislature refer to a bastard child, "*which it is probable will become chargeable to the county*"; and in the second, to such bastard child or children, as "*have or shall become chargeable to the county*". And that in the latter act, provision is made for the enforcement of the bond by the Inferior Court, in such a way as serves to show, that the Legislature contemplated protection to the interests of the county, *as a county*.

From these things we conclude, that by our Law, there is no breach of such bond, until the bastard child or children has or have become *chargeable to the county*, and that not until then can the Inferior Court bring suit upon it.

[2.] What is to be considered and treated as evidence, that such child has become chargeable to the county?

That the answer which we give to this question may be correctly appreciated, we premise, that in this State, we have no

such poor law system as exists in some other countries, and especially in that from which we chiefly derive our laws; where, by settlement of law, the right of a pauper to support, by a certain county or parish, is sometimes fixed. Our Legislation only declares, that "the Inferior Courts shall have power to inquire into the circumstances of the poor, bind out orphans, appoint guardians, and appoint overseers of the poor; and for this purpose, shall levy a tax". (*Act 1792, Cobb's Dig. 346.*) An Act of 1818 provides, that the tax "shall not exceed one-eighth part of the general county tax". (*Cobb, 347.*)

To the Inferior Court, a wide discretion, in the premises, is thus left. They are to inquire into the circumstances of the poor, to determine who shall be considered and treated as a pauper, and whether or not he or she shall become chargeable to the county. A bastard child is not, therefore, chargeable to the county, until the Inferior Court has given their sanction to its becoming so, and by some act, fixed this *status* for it. It may be born of a mother, an inhabitant of the county, who is unable to support it, or to pay the expenses of her lying in; yet, she may be so situated, (living, perhaps, with parents or friends, who are willing and able to maintain her and her child,) as to make it expedient that the Court should not treat the child as chargeable to the county.

[3.] This consideration influences us to hold, in answer to the question which we have put, that evidence of the child's having become chargeable to the county, must be some act or order of the Court, making it so. A majority of this Court (my brethren) think that the proper evidence, is some payment made by the Court, of some portion of expenses, in this behalf incurred, after failure of the putative father to pay the same, or some order, made by the Court, for such payment. This affords, as they think, a plain and practical manifestation, that the Court regards the child as chargeable to the county. For myself, I go a little further, and am of opinion, that after failure of the father to pay any such expenditures, any other expression by the Court, and entered on their records accordingly, (it might be a direct declaration to this effect,) that they con-

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sider the child as chargeable to the county, or have elected to make it so, will, in like manner, afford sufficient evidence that the child has become chargeable to the county.

But no such evidence exists in this case, and the judgment must be affirmed.

No. 15.—JOHN M. BARKSDALE and others, plaintiffs in error, vs. ISAAC M. BROWN, guardian, &c. defendant in error.

[1.] It is not necessary to state, in the bill of exceptions, the grounds of objection to the judgment complained of. Stating the judgment excepted to, is sufficient.

[2.] A propounds for probate a paper, as the will of B. This paper makes A executor, and gives him a legacy. There is a caveat, and then a verdict and judgment, that the paper is not the will of B. Afterwards, C files a bill to set aside this verdict and judgment, and to be allowed to propound and prove as the will of B, all that part of the same paper, in which part A has no interest. To this bill A is not made a party: *Held*, that there is no equity in the bill.

Decision on demurrer, in Upson Superior Court, by Judge STARKE, May Term, 1854.

Caroline W. Bunkley, by her guardian, filed her bill, charging that her father, George W. Bunkley, from an infant, was taken and reared by his uncle, John Bunkley and his wife Macharine, and was much loved by them, they being childless; that Macharine Bunkley died, leaving a will, in which large legacies were left to complainant and other children of George W. Bunkley, (he being dead); that Dr. James Anderson was appointed executor thereof, and also took a legacy under the same; that a caveat was entered to said will, on the ground that Anderson wrote the same, took a large interest under it, and that the will was never read to testatrix. On this ground,

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the Jury found a verdict against the will. Complainant was then not one year old, and had no guardian to protect her rights. She afterwards applied to the Ordinary, for leave to make probate of said will, on various grounds; which probate was refused. The bill set forth the evidence in full, on the issue of *Devisavit vel non*, and charged that the complainant could not purchase Anderson's interest, so as to make him a competent witness, and that he would not voluntarily relinquish. The bill charged that one John M. Barksdale was the principal witness on the trial of the caveat; that he was largely interested in a former will revoked by the latter, and which former will is now offered for probate, taking under it the legacies given to complainant, with others, under the last; that the verdict obtained was *fraudulent and void*—1st. Because the testimony of said John M. Barksdale and one Matilda Towns, (another witness for caveators,) was false in several items specified in the bill. 2d. Because she was an infant and unrepresented at said trial. 3d. Because of newly discovered evidence set forth in the bill, and because James Anderson had in his possession the original draft of said will, and failed to produce it on the trial.

The bill charged that James Anderson knew that Mrs. Bunkley had read the will and knew its contents, and no other witness knew the fact, and insisted that he be made a witness, and the will set up, excepting his legacy.

The prayer was for a new trial, and for an injunction.

A general demurrer to this bill, for want of equity, was over-ruled, and this decision is assigned as error.

HILL & SMITH, for plaintiffs in error.

O. C. GIBSON and CHAPPELL, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

In this case, the defendant in error joined issue, with a protest, that neither the bill of exceptions nor the assignment of

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errors, specified the error or errors complained of in the decision of the Court below. What was meant by this protest, is explained by the position taken in its support, by Mr. Gibson, one of the Counsel for the defendant in error. That position was this: "A bill of exceptions is the statement, in writing, of the objection made by a party in a cause, to the decision of the Court, on a point of law which is clearly stated therein". The statement of the "*objection*".

Of error or of objection, the only specification contained in the bill of exceptions is, that the Court over-ruled the demurrer, and that the plaintiff in error excepted to that decision. Of the objections or grounds of objection to the decision, the bill of exceptions says nothing. It is, therefore, against this omission that the protest is aimed.

Was it necessary that the *objections* to the decision, should have been stated in the bill of exceptions?

The fourth section of the Statute to organize this Court, contains this passage: "all causes of a criminal or civil nature, may, for alleged error, in any decision, sentence, judgment or decree of any such Superior Court, be carried up", &c. For alleged error in any decision—that is to say, for alleged error, *consisting* in any decision, or alleged error in the *making* of any decision. The sense would be the same, had the words been, that all causes may be carried up, on an allegation that the Court erred, in such or such a decision, or on an allegation that such or such a decision was erroneous. It is familiar language in the mouth of lawyers and non-lawyers, that "a Court erred in such a decision", or "in deciding so and so", when they mean to say a particular judgment was erroneous. There is nothing, in this passage, which says, impliedly or expressly, that to carry causes up, it is necessary to do something more than allege a judgment to have been erroneous—that in addition to that, it is also necessary to state the objections, or grounds of objection, to the judgment; in short, to state, in brief or at length, the argument used before the Court, in resistance to the making of the judgment. Had

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the passage said this, it would have said what would be equivalent to saying, that no cause should be carried up on a mere exception to a judgment—an exception for which no reasons were given—in favor of which no argument was made. And if no cause could be carried up on any thing except arguments—except “objections” stated to decisions, when would the lawyers, conducting cases in the Courts below, consider themselves at liberty to stop arguing? What decisions would they consider themselves at liberty to let pass, without argument? What remoteness of arguments would they consider remote enough to justify them in not using the arguments? What number of repetitions, of the same thing, would they consider numerous enough to warrant them in relying upon the memory of the Court to give them the benefit of the thing, if they should happen, afterwards, to want it for use in a bill of exceptions? What stock of attention, on the part of Court and Jury, would not be worn out before the end of trials, conducted on this plan? And this would be but a beginning. The losing lawyer would have to have his bill of exceptions, and that would contain all the objections urged to the decisions of the Court complained of—all those objections, whether good or bad—relevant or irrelevant—for knowing that he could urge, in the Court above, no objections but those urged in the Court below, and feeling it only the part of prudence to take all the chances, he would not leave a single one of those objections out of his bill of exceptions. And then, how enormously would be swelled the expenses of litigation.

And after all, what would be the gain? What, in either Court? Would not the gain be a loss? Would not the effect of bringing into a case so much of the immaterial, be to hide the material—so much of the weak, be to dilute the strong—to make the salt become invisible in the water?

If, then, it were a doubtful question, whether this passage in the fourth section of the Statute to organize this Court, is not susceptible of a construction which would support the position of the defendant in error, the argument, from effects and consequences, requires us to say that that construction is one

which the passage ought not to have. But, indeed, it is *not* susceptible of that construction. And it has not, at least as a general thing, been practised upon as susceptible of that construction. The bills of exception which have been actually used, have, for the most part, contained no more than a statement of the particular judgment excepted to, together with the facts of the case. And the propriety of such bills is sanctioned by the form of a bill of exceptions, published by the Reporter of this Court, in connection with the rules of Court—a form which, before it was published, received, it is understood, the approval of each of the persons who then constituted this Court.

This passage, then, in the Statute, does not support the position of the defendant in error. There is another passage which, it may be thought, does that. It is this, in the same fourth section: “any cause of a civil nature, either on the Law or Equity side of the Superior Court may, in like manner, be carried to the Supreme Court, on a bill of exceptions, specifying the error, or errors, complained of in any decision or judgment”, &c. Specifying *the error, or errors*, are the words, not specifying the objection or objections to the judgment complained of. The specification is to be of errors committed by the Court; that is, of wrong judgments rendered by the Court—not of objections to judgments urged by a party. This passage, indeed, is but in harmony with the previous one, which has just been considered.

So much for the Statute. I may remark, that giving the Statute this construction, is but making it correspond with the old law—the English law, regulating bills of exception. The Statute of 13 *Ed. I. c. 31*, authorized “exceptions” to decisions to be taken. It did not require the *grounds* of the exceptions to be stated. In practice, under the Statute, that is not done. (2 *Tidd*. 862. *Tidd's Appendix*, ch. 37, §46.

The protest, then, ought to be over-ruled.

Is there any equity in the bill, in this case? The Court below held that there was.

The prayer of the bill is, that the “verdict and judgment rendered in the matter of probate and caveat of the” “will of

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Macharine Bunkley," may be annulled, "for fraud and newly discovered evidence"; that Tyrrell Barksdale and Stephen Harvey, and "all the rest of the heirs at law, of Macharine Bunkley, may be perpetually enjoined from further using said verdict and judgment, in behalf of said plea, in bar, filed by said defendant, in the matter of her (the complainant's) application for probate of said will"; that said Barksdale and Harvey Eusebius H. Hopkins, and Anna Hopkins, his wife, may be enjoined from proceeding further with the trial of the probate—and caveat of the instrument made by Macharine Bunkley in 1848; that the Superior Court of Upson County may be directed to allow the complainant to make probate of a part of the will of 1850, viz: all of it except the part which gives a legacy to James Anderson, and that she, the complainant, may have such other relief as she may be entitled to have.

James Anderson is not a party to the bill.

The great object of the bill is, to have annulled the verdict and judgment which decided that the instrument of 1850 was not the will of Macharine Bunkley. If this object can be attained, then another object of the bill becomes important, viz: the obtainment of evidence—the obtainment of the evidence of James Anderson, to assist in establishing that instrument of 1850, as the will of Macharine Bunkley.

James Anderson having been appointed the executor of that instrument, and having been given, by it, a legacy, is incompetent as a witness, to testify in support of the instrument. The complainant wants to use him as a witness in its support, and this object she seeks, in the bill, to accomplish thus: she prays that she, instead of him, Anderson, may be allowed to prove the instrument to be the will of Macharine Bunkley, and that in so proving it, she may be absolved from the duty of proving that part of it in which Anderson has an interest. All the rest of the instrument he would be competent, as a witness, to support.

The judgment which the bill seeks to annul, is a judgment, to one side of which James Anderson is the only party; certainly the chief party. It is a judgment in a case in which he,

as executor, was the propounder of the instrument of 1850, and others were caveators.

One of the grounds on which the bill puts its prayer for annulling this judgment, is fraud—fraud in the procurement of the judgment. Whether this fraud is fraud committed by Anderson, or fraud committed on Anderson, the bill does not state very distinctly. Assuming that the bill means to say the fraud is fraud committed by Anderson, then, the prayer of the bill, to set aside the judgment, becomes one involving not only Anderson's legal rights, but also his character for integrity.

These things being so, can the bill, without having Anderson as a party to it, have in it any equity? Most clearly not. In his absence, the great objects of the bill cannot be decreed—in his absence, the judgment to which he is a party cannot be annulled—in his absence, his name, both as executor and legatee, cannot be struck out of the will—in his absence, nothing worth doing can be done.

Inasmuch, then, as Anderson is not a party to the bill, there is no equity in the bill.

Why he was not made a party, we cannot tell. The same reasons which prevented his being made one, may continue to prevent it. If so, it will never become necessary to decide the other questions connected with this case—questions, some of them, both of much importance and much difficulty. At all events, it will be time enough to decide them when it has become necessary to decide them. Besides, if ever presented again for consideration, they may be presented upon a statement of facts different from that on which they are now presented—a statement, made up of allegations, especially as to fraud, more precise and certain than the statement in the present bill. Indeed, the only question for this Court is, whether or not the bill, as it stands, has any equity in it? And when the Court says it has none, it has given the full answer to the question; and were it to go further, and say that if the bill had equity in it, then, such and such other questions in the bill would be decided so and so, the Court would go beyond its sphere. The most that the Court can do, is to say there is no equity in the

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bill, as the bill stands, but that the complainant may, if she pleases, either amend it or file a new bill.

No. 16.—BOSTON & GUNBY, plaintiffs in error, vs. VALINDA CUMMINS, claimant, defendant.

- [1.] Acts of the Legislature are not only presumed to be constitutional, but the authority of the Court to declare them void, will never be resorted to, except in a clear and urgent case.
- [2.] *Ex post facto* Laws defined; they extend to *criminal* and not to *civil* cases.
- [3.] A law may be *ex post facto*, and still not obnoxious to the inhibition in the Constitution.
- [4.] Retrospective Laws often operate for the benefit of society, and to repudiate them altogether, would be to obliterate a large portion of the Statute Law of the State.
- [5.] Registry Acts may be passed, requiring deeds already executed to be recorded within a limited time; and if the older grantee fail to comply with the Law, he will be postponed to a junior grantee, who brings himself within the Statute.
- [6.] The policy pervading our Registry Acts, has existed since 1755.
- [7.] Our Law makes no distinction between conflicting conveyances under the Registry Acts, and contests between grantees and judgment creditors.
- [8.] Until the 33d of *George III*, it was the settled rule in the Courts of Great Britain, that an Act of Parliament, which was to take effect from and after the passing of it, should operate from the first date of the session.
- [9.] There are numerous Acts passed ten months ago by our own Legislature, operating upon the persons and property of individuals, and imposing pains and penalties for acts done or omitted in contravention of them, which have not yet been duly promulgated.
- [10.] The Act of 1847, requiring marriage settlements, already made, to be recorded within twelve months after its passage and publication, and those executed afterwards, within three months from their date, makes no exceptions in favor of *feme covert*s; and consequently, the Courts can make none.
- [11.] It is exceptions engrafted on Statutes, by the Courts, that give rise to the uncertainty of the Law.
- [12.] The Act of 1847 is framed with technical skill and accuracy, and is not

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only a reasonable but a liberal Law; and one which ought to be enforced in good faith.

[13.] Where the husband acts as trustee *de facto* of the wife, he must discharge all his duties as such; and failing to do so, the consequences will be visited upon the *cestui que trust*.

[14.] Where a *feme covert* possesses and enjoys all the rights and powers of a *feme sole*, over her separate estate, she must perform the corresponding obligations of one.

[15.] The policy of our Registry Laws existed under the Colonial and Provincial Governments; and in framing our State and Federal Constitutions, their fundamental principles entered, as it were, by tacit consent, into the structure of American Commonwealths; and hence, the uniformity and universality of the doctrine, as it regards our Registry Acts, as expounded by all the Courts of this country.

[16.] The Parliament of Great Britain were in the habit of passing bills of attainder and of pains and penalties, after the fact to which they related. And to prevent these abuses, the prohibition against *ex post facto* Laws, was introduced into all of our American Constitutions.

[17.] But neither by the Civil Law, from which most of the Continental systems were borrowed, nor the English Law, upon which ours is founded, is retroactive legislation forbidden.

[18.] It is a matter of discretion with the Legislature, under the restrictions of the fundamental compact, how far it may be expedient to enact laws of this description.

[19.] The General Assembly of Georgia, acting within the pale of the Constitutions of the United States and of this State, has the same omnipotence ascribed to the British Parliament.

Claim, in Spalding Superior Court. Tried before Judge STARKE, May Term, 1854.

This was a case, in which certain *fi. fas.* in favor of Boston & Gunby, against Francis D. Cummins, had been levied on certain negro property, as the property of Cummins; to which a claim was interposed by said Cummins, as trustee for his wife, Valinda Cummins.

The plaintiffs introduced their *fi. fas.*, proved the levies, and that the property was in possession of defendant.

Claimant introduced a marriage settlement, executed in 1833, between F. D. Cummins, of the one part, Valinda Davis, afterwards Cummins, and Martha Davis, trustee, of the other

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parts, by which certain property (proven to include the property now in question) was conveyed to the said Martha Davis, in trust, for the sole and separate use of the said Valinda, then about to be married to Francis D. Cummins.

This instrument was not recorded until June 26, 1852. The *fi. fas.* levied were on judgments obtained at November Term, 1852, on debts contracted in 1851. It was objected, on the part of the plaintiffs, that this conveyance was void, as against creditors, without notice, by the Act of 30th December, 1847, which provides that all marriage settlements, before that time executed, where the husband resides within the State, should be recorded within twelve months after the passage of the Act, or else be void, as against *bona fide* creditors, securities or purchasers, without notice.

The Court decided that this Act, in its application to past contracts, is unconstitutional and void; and this decision is alleged as error.

An exception was also filed by the plaintiff, to the refusal of the Court to admit, as testimony, the following extract from a letter of the defendant, F. D. Cummins, to them, dated February 16th, 1851, which was as follows: My property, at present prices, is worth \$5000, and there is not the scrape of a pen, in any Court, high or low, against me. I have concluded not to buy any more cotton, the market at home and abroad being so unsettled and uncertain. I rest confident you will do the best you can for me. The Jury having found the property not subject, the plaintiffs in *fi. fa.* excepted to said rulings of the Court.

ALFORD & MOORE; WARNER, for plaintiffs in error.

GREEN; MCKINLEY, for defendant.

By the Court.—LUMPKIN J. delivering the opinion.

The Legislature, in 1847, passed an Act to require marriage settlements to be recorded.

Section I. enacts, "That all marriage agreements or settlements, *heretofore executed*, either within this or any other State

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or Territory, where the husband resides within the limits of this State, shall be recorded within twelve months after the passage and publication of this Act, in the Clerk's office of the Superior Court, in the County of the residence of the husband".

Section II. "All marriage agreements or settlements, hereafter, made either in this State or any other State or Territory, where the husband resides in this State, shall be recorded within three months from the execution thereof, in the Clerk's office of the Superior Court of the County of the husband's residence".

Section III. "If any such instrument be not recorded within the time prescribed by this Act, the same shall not be of any force or effect, against a *bona fide* purchaser, without notice, or *bona fide* creditor, without notice, or *bona fide* surety, without notice, who may purchase or give credit, or become surety, before the actual recording of the same". (*Cobb's Digest*, 180.)

Is this Act unconstitutional, as applicable to marriage settlements, executed before its passage?

[1.] I need not repeat, here, what has often been declared before by this Court, viz: that Acts of the Legislature are not only presumed to be constitutional, but that the authority of the Courts to declare them void, will never be resorted to, except in a clear and urgent case—one which is directly in the teeth of the Constitution—as if the Legislature were to vest the Executive power in a Standing Committee of the House of Representatives; one which requires no nice critical acumen to decide on its character, but which is as obvious to the comprehension of any person as an axiomatic truth; as, that all the parts are equal to the whole, or that two and two make four.

A judgment of the Court, and even a Statute, may be vacated for fraud. (*Fermor's Case*, 8 Coke, 77.) Can it be questioned, that but for the Rescinding Act of 1796, the celebrated Yascoo Act of 1795 would have been declared null and void by the Courts?

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If the Courts have the power to sit in judgment upon a solemn Act of the Legislature, passed according to the forms prescribed by the Constitution, because the Statute has been procured and perfected through the instrumentality of fraud, *a fortiori*, is the Judicial Department authorized to declare an Act unconstitutional?

Whenever this shall happen, from inadvertence or otherwise, it is manifestly the duty of every Court to protect the rights of the citizen from violation, and to vindicate the Constitution. The unconstitutional Acts of the Legislature, State or Federal, *are not laws*; and no Court will execute them, having a proper sense of its own obligations and responsibilities.

If the Act in question, then, impairs the force of contracts, or confiscates private property, or disturbs any vested rights, we ought not to give it effect. But is this its character?

[2.] The distinction between *ex post facto* Laws, and *retrospective Laws*, is well understood, and has long been acted upon by the Courts of this country. Every *ex post facto* Law must, necessarily, be *retrospective*; but every *retrospective* Law is not an *ex post facto* Law. The phrase, *ex post facto*, in the Constitution, extends to *criminal* and not to *civil* cases. And under this head, is included—1st. Every law that makes an action, done before the passing of the law, and which was *innocent*, when done, criminal, and punishes such action. 2d. Every law that *aggravates a crime* or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment* than the law annexed to the crime, when committed. 4th. Every law that alters the *legal rules of evidence*, and receives less or different testimony than the law required, at the time of the commission of the offence, *in order to convict the offender*. All these, and similar laws, are prohibited by the Constitution.

[3.] It is conceded that a law may be *ex post facto* even, and still not amenable to this constitutional inhibition; that is, provided it mollifies, instead of aggravating the rigor of the Criminal Law.

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Mr. Justice *Paterson*, who was a member of the Convention that framed the Constitution of the United States, in *Caldwell and Wife vs. Bell and Wife*, says that he had an ardent desire to have extended the *ex post facto* provision in the Constitution, to *retrospective* laws, in general. He considered that there was neither policy nor safety in such laws, and that they neither accorded with sound legislation, nor the fundamental principles of the Social Compact. And Judge *Chase*, in the same case, remarked, that it was a good general rule, that a law should have no *retrospect*.

[4.] And while I concur with these eminent men, that every retrospective law which seeks to take away or interfere with vested rights, may be unjust and oppressive; still, I hold that there are numerous cases where retrospective laws operate for the benefit of the community. To repudiate them altogether, would be to obliterate a large portion of the Statute Law of this State.

The General Assembly of Georgia have passed Limitation Acts, requiring existing judgments to be enforced within a specified period; they have abolished joint-tenancies; and the Act for this purpose has been construed to apply to estates, where the execution of the deed creating them, was prior to its passage. They have altered the law respecting divorces, and it has been held to extend to cases prosecuted after its enactment, although the facts upon which the divorce should be obtained, were committed before. They have passed laws giving remedies, by attachment and garnishment, against existing corporations: indeed, our Digest abounds with *retrospective* Statutes, relating to these artificial bodies; requiring them to make periodical returns—imposing certain penalties, should they refuse to redeem their notes in specie, when demanded, &c.; priority of payment has been given to *cestui que trusts*, in certain cases of insolvency, whether the trust debt was contracted before or after those due to other creditors; thereby, it would seem, infringing the strict rights of the postponed classes. The Statutes exempting certain articles of property belonging to the debtor, from levy and sale, belong to this same

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class. These and innumerable other instances might be adduced, to show the sense of our own people upon this subject, namely: that laws which were, in form and in fact, *retrospective*, have been either adjudged to be constitutional by the Courts, or uniformly acquiesced in; and thus, may be considered as having received the public sanction.

[5.] It is admitted, in the argument, and held as settled law, in all the Courts of this country, both State and National, that Registry Acts may be passed, requiring conveyances, already made, to be recorded within a reasonable time; and that an older grantee, failing to perform this duty, will be postponed to a junior grantee, who brings himself within the Statute.

[6.] Such has been the settled policy of this State, from 1755 to the present period, as the numerous Acts passed within that time will demonstrate. (See *Cobb's Digest*, 159, 162, 171 and 175.)

It is insisted, however, that the principle of this species of legislation, does not apply to a marriage settlement; and that should the Act of 1847 be enforced, in this case, it would not only impair, but utterly subvert the obligations of this contract. That the practical effect would be, to divest the trustee of the legal title to the negroes embraced in the settlement, and to revest the same in the wife; and by virtue of the marital rights, in the husband, the defendant; and that, too, in the face of his own stipulation in the deed, to which he was a party, that this property should, in no event, be subject to his contracts.

[7.] Let us examine into the operation of these Registry Acts. A conveys a tract of land to B. At the date of the deed, there is no Act requiring the conveyance to be recorded. Ten years afterwards, a law is passed, requiring all deeds to land, already made, to be recorded within twelve months from the passage and publication of the Statute; and that B, failing to do so, C holding a junior deed from A to the same land, recorded within the time prescribed by the Act, shall have preference over B. Is not the effect of this Act to divest B

of his title, to re-vest it in A, notwithstanding he absolutely parted with all right in the same to B, before selling to C, and then through A, to transfer the estate to C?

The parallel is complete, with this difference: In the one case, A parts, forever, with all the interest which he had or held in the property: whereas, in the other, the settler only divests herself of the legal title, reserving the entire use to herself, to be shared and enjoyed with the husband. The case under the Registry Acts, is more objectionable, and much more questionable, as to its constitutionality, than the one under consideration.

By the 4th section of the Act of 1827, it is provided, that "upon failure to record any mortgage, as hereinbefore required, within the time prescribed, that in such case, all judgments obtained before the foreclosure of the mortgage, and also any mortgage executed after the same, and duly recorded, shall take lien on the said mortgaged property, in preference to the older mortgage". (*Cobb's Digest*, 172.)

Thus, it will be perceived that the policy of our law makes no distinction between conflicting conveyances, under the Registry Acts, and contests between grantees and judgment creditors.

In the opinion of this Court then, the Act of 1847, as applicable to this marriage settlement, is constitutional and valid. Moreover, we believe it to be not only a reasonable, but a liberal Act. Had it declared all marriage settlements, executed before its passage, but not recorded, void, as against purchasers, creditors and securities, for one, I would have refused to enforce it. But this Act is no journeyman-work; it is drawn by a master-hand; it is a model Statute; it allows instruments of this kind, already executed, to be recorded within twelve months from its passage and publication; whereas, all settlements made since, must be registered within three months from their execution.

[8.] Let those who denounce, so vehemently, the rigor of this law, remember that not long ago, it was a settled rule in the Courts of Great Britain, that an Act of Parliament which

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was to take effect, from and after the passing of it, should operate from the first day of the Session, let the Act have been passed on what day it might, during the Session. (1 *Plowden*, 79. 6 *Bro. P. C.* 553.) This rule of construction was maintained by the Court of King's Bench, in the case of *Latless vs. Holmes*, to have been "so long settled that it could not be shaken". (4 *D. & E.* 460); and the Court refer to one case in which "the life of a person was affected" by the operation of it; and it could only be abrogated, as *Christian* observes, by Parliament. (33 *George III. c.* 13.) What becomes of the supposed absurdity and injustice of the Act of 1847, when compared with this instance of the doctrine of relation?

[9.] How many laws, civil and criminal, are now in full force in this State, and which every citizen is bound to observe and obey, at his peril, which have not been published and distributed in the usual form, among the people? In the case before us, the Statute was not allowed to operate, until twelve months after its publication; and yet, there are scores of Statutes passed by the last Legislature, operating upon the persons and property of individuals, and imposing pains and penalties for acts done or omitted in contravention of them, which have not yet been duly promulgated? If this objection, as to *retrospection*, obtains, then, indeed, is the whole legislation of the State, under the existing state of things, as to the publication of the laws, obnoxious to it; and the Courts will have their hands full of business.

[10.] But there are peculiar circumstances, it is contended, in this case, which should take it out of the operation of the Statute. And although the Court declined to put its decision upon these special facts, still, if they will protect the title of Mrs. Cummins to this property, we will, with great pleasure, give to her the benefit of them.

The marriage settlement was executed in February, 1833. It was delivered to Miss Martha Davis, the trustee, who was in bad health at the time, and died in July, 1836. Mrs. Anne Finley, another sister and a subscribing witness, took possession of the trunk of Miss Davis, containing, among other

things, this document, and retained the possession of it until she married, when it was delivered to Mrs. Cummins. Now, the argument is, that Mrs. Cummins, being a *feme covert*, no *laches* can be attributable to her, so as to work a forfeiture of her rights.

First, we say, the Act, itself, makes no exception in favor of *feme coverts*; and consequently, we can make none.

[11.] All Courts, both in England and in this country, regret that any exceptions were ever engrafted, by the Bench, on the Statutes of Frauds and of Limitations; and, I will add, to any other Statute. This is that Pandora's Box from which has emanated that curse and reproach of the law—its uncertainty. Adhere to the plain language of the law, and all can comprehend its meaning, and will conform their conduct and contracts to it. Lawyers will then know how to advise their clients; because, they can understand the law as it is written in the Statute Book, while they cannot foresee or foretell what it will be made by Judicial Legislation.

[12.] Being called on, then, to put a construction, for the first time, on the Act of 1847, which is framed with technical skill and accuracy, and the object of which we cordially approve, we shall be careful not to expose ourselves to the reproach of our successors, by doing the very thing we condemn in our predecessors, namely: create exceptions where the law makes none. All marriage settlements *must* be recorded within the time prescribed, or the consequences *must* follow.

If we make this exception, we establish the principle, that whenever the elder grantee or the trustee, in the case of marriage settlements, dies within the Statutory limit for recording the instrument, the law does not apply. And this rule must extend to instruments executed since, as well as before the Act; for as to the doctrine which is claimed, it can make no difference. And yet, did any body ever know of an application to a Court, either of Law or Equity, for relief, against the law, upon any such ground? It is a new reason for relief against the unbending severity of our Registry Acts.

[13.] But again: the record shows that Major Cummins,

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the defendant, managed and controlled this property, acting, as he was entitled to do, by law, as the agent or trustee, *de facto*, of his wife. The duty devolved on him to see to the registration of this settlement. At the time it was executed, he, himself, suggested that it should be placed in the hands of the Clerk, to be recorded. True, it may not have been necessary to do this, at the time, as the law then stood; still, it shows that his attention, as well as that of the other parties to the contract, was called, even at that early day, to the subject.

[14.] But there is this further answer to the position, under which the defendant in error seeks to excuse herself from a compliance with the law. By the terms of this deed, Mrs. Cummins reserves to herself the absolute power and control over the property, in as full and ample a manner as though she were a *feme sole*. She is a *feme sole*, as to this property, to all intents and purposes. And while she enjoys the rights, she must perform the corresponding obligations of one. If the penalty of postponement would be visited on every other single woman, and perhaps even on infants of tender years, under our Registry Acts, she cannot be exempted. This view of the question is, to my mind, conclusive.

[15.] The learned Counsel for the defendant in error, who has argued this case with so much ability, suggests that the peculiar policy of our Registry Acts, existed under the Colonial and Provincial Governments, which were, themselves, in this and many other respects, founded upon the Common and Statute Laws of England; and that in framing our State and Federal Constitutions, these fundamental principles entered, as it were, by tacit consent, into the structure of American Commonwealths. And hence, the uniformity and universality of the doctrine, as administered by all the Courts of this country, as it regards our Registry Acts.

Without stopping to inquire whether marriage settlements, as well as all other conveyances, both of real and personal property, do not legitimately fall within this class of legislation, allow me to say, that the very same reason operates, and with double force, in behalf of *retroactive legislation*.

[16.] The Parliament of Great Britain were in the habits of passing bills of attainder, or bills of pains and penalties; they declared acts to be treason, which were not so at the time they were committed; they violated the rules of evidence, to supply a deficiency of legal proof; they authorized evidence to be received without *oath*; they admitted the wife to testify against the husband; they inflicted punishments where the law prescribed none; and greater punishment than the law annexed to the offence. To prevent these abuses, the prohibition against making *ex post facto* Laws, was introduced into all of our Constitutions.

[17.] But neither in the Civil Law, which is the basis of the different Codes, to a greater or less extent, of all Continental communities, nor by the English law, from which our system was more directly borrowed, and which is, itself, much more indebted to the Civil Law than the Jurists of that country have ever been willing to acknowledge, has the right to pass retrospective acts ever been doubted.

[18.] And it is a matter of discretion, pretty much, for the Legislature, (under the restrictions of the fundamental compact,) how far it may be expedient to enact laws of this description.

[19.] For myself, I have always supposed that our General Assembly, when acting within the pale of the Constitutions of the United States, and of this State, has the same omnipotence ascribed to the British Parliament. "It has sovereign and uncontrollable authority in the making, confirming, restraining, abrogating, repealing, reviving and expounding of laws, (*Bradde vs. Brownfield*, 2 *Watts & Sergeant's R.* 271,) concerning all matters, of all possible denominations". (1 *Bl. Com.* 160.)

While I concede to the Legislature even the power of *expounding* laws, let it be borne in mind that it is with the limitation which I have stated; that it is not the power which belongs to the Parliament of Great Britain, in this respect, but the power which belongs to an *American* State, where the three Departments of the Government are distinct and sepa-

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rate, and each restrained within marked and settled boundaries.

Holding, then, as we do, that this Act is in furtherance of justice, and that the Legislature cannot be charged with violating its duty or exceeding its authority, in its passage, we are constrained to reverse the judgment of the Court below, in pronouncing it unconstitutional and void, as applicable to this marriage settlement.

Unless, then, notice can be brought home to these judgment creditors, they must succeed. In other words, in the absence of notice, this marriage settlement does not stand in their way, under the Act of 1847.

As to the rejection of the letter, we think the Court ruled right. The representations of the defendant were inadmissible, to prejudice the rights of the claimant.

No. 17.—N. B. GOODWYN, plaintiff in error, vs. NANCY GOODWYN, defendant in error.

[1.] If the right of action be once barred in the case of a *tort*, no subsequent acknowledgment will tak it out of the express language of the Statute of Limitations. In cases of *assumpsit*, an acknowledgment will have this effect, because such acknowledgment then amounts to a new promise.

[2.] But this principle does not apply, where the acknowledgment of the defendant is not proved, for the purpose of showing that a *tort* had been committed, but for the purpose of showing that at a period within the term of years which the Statute constitutes a bar, the possession had not been adverse, because the defendant had acknowledged that the property sued for belonged to the plaintiff.

[3.] If A hold property adversely to B, for several years, and afterwards, in conversation with witnesses, admits that the same is not her property, but belongs to B, as upon the trial where the Statute is pleaded, the Jury may believe, from the statement of these witnesses, that such admissions amounted to an acknowledgment that A was then holding the property for B, and not claiming it in any other right, it is error in the Court to charge the Jury

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that "this testimony, though serving to show whether or not the possession was adverse, yet could not be used to excuse the plaintiff from suing within the time prescribed by law, nor to prolong the time within which the plaintiff must sue or be barred, nor does it furnish a fresh starting point for the commencement of the Statute."

Trover, in Coweta Superior Court. Tried before Judge STARKE, March Term, 1854.

This was an action of Trover for negroes, and plea of the Statute of Limitations.

When the plaintiff had made out his case, the defendant introduced proof that she had denied plaintiff's right, and asserted title in herself in 1843, and had given notice thereof to plaintiff at that time.

The action was commenced in 1849. Plaintiff, in rebuttal, proved by two witnesses, Beadles and King, that in 1846, or the first of 1847, defendant had admitted, in their hearing, that the property in question was the property of plaintiff.

The Court charged the Jury, that the facts testified to by Beadles and King, could but go to explain the nature of defendant's possession, whether adverse or not: but they could not go to excuse the plaintiff from suing within the time prescribed by law, or to prolong the time in which the plaintiff must sue or be barred: nor could they be used to wipe out or obliterate any previous causes of action which plaintiff may have had: nor did they furnish a fresh beginning point for the commencement of the operation of the Statute; for which purposes said admissions were nullities; they may show whether her possession was adverse or not. The plaintiff must sue within four years of the time the first cause of action accrued, or be barred.

To which charge of the Court plaintiff excepts.

HAMMOND; WRIGHT, for plaintiff in error.

SIMMS; WARNER, for defendant.

By the Court.—STARNES, J. delivering the opinion.

The Court below instructed the Jury, that "the testimony of the witnesses, Beadles and King, though serving to show whether or not the possession of the defendant was adverse, yet, could not be used to excuse the plaintiff from suing within the time prescribed by law, or to prolong the time within which the plaintiff must sue or be barred: nor can they be used to wipe out or obliterate any previous causes of action, which the plaintiff may have had: nor do they furnish a fresh starting point for the commencement of the Statute; for these purposes, these facts are nullities; they may show whether the possession was adverse or not."

We understand the testimony of these witnesses, as being introduced for the purpose of showing that the defendant, in the Court below, Mrs. Goodwyn, at the time to which this evidence relates, (which was sometime in the year 1846 or 1847,) had acknowledged, in effect, that certain of the slaves in controversy, of which the others are offspring and issue, belonged to her son, and for the purpose of relying thereupon, as evidence, that she was not then holding adversely to the plaintiff; and as a consequence, that his claim is not barred by the Statute of Limitations.

Now the Court instructs the Jury, that this testimony was proper evidence to show the first of these things, viz: that the possession of Mrs. Goodwyn was not, at that time, adverse; but he also tells them, that though this were so, yet it could make no difference, as to the Statute of Limitations; that it could not excuse the plaintiff from suing within the time prescribed by law, if the Statute had previously commenced to run against him, nor prolong the time within which the plaintiff must sue or be barred, nor furnish a fresh starting point for the Statute. The plain English of all which simply is, that if the possession of Mrs. Goodwyn had been previously adverse, and the Statute had been running in her favor, these acknowledgments could not stop or suspend it, though they did show that she was not then holding adversely.

[1.] Such was the argument made before us. The elementary principle invoked to sustain it was, that which declares, that "if the right of action be once barred in *torts*, no subsequent acknowledgment will reserve it from the express language of the Statute". That in cases of *assumpsit*, only, will an acknowledgment have such effect. *Tanner vs. Smart* (6 B. & C. 274. *Ang. on Lim.* 219.) The reason being, that in cases of *assumpsit*, the acknowledgment amounts to a new promise; whilst it would be absurd to hold, that in cases of *tort*, the acknowledgment amounted to a new *tort*.

A correct illustration of this principle, is found in the case (which was cited at the bar) of *Oathout vs. Thompson*, (20 John. 277.) That was an action for deceit, growing out of the purchase of a negro woman slave, in N. York. The cause of action originated in 1814, and six years or more (the statutory term of limitation in such a case, in that State,) had elapsed before suit commenced. The witness proved that in 1815, he heard the plaintiff charge the defendant "with cheating him in the sale of the wench, and the defendant did not deny it". The Court very properly held, that this acknowledgment did not take the case out of the Statute. It could not amount to a new *tort*, and therefore, could not interfere with the operation of the Statute.

[2.] This is all correct; but it is not the case presented by this record. It was not sought to take the case out of the Statute, by evidence, which proved an acknowledgment that a *tort* had been committed. It was rather offered for the purpose of showing that there had been no *tort* committed; or at all events, that at the time to which it referred, the defendant was not committing a *tort* to the injury of plaintiff, because not holding the property in dispute, adversely to him. In other words, the testimony was offered, not as an acknowledgment that the *tort* had been committed, and thus to take the case out of the Statute, but for the purpose of showing, that at a period within the term of years which the Statute constitutes a bar, the possession of the defendant had not been adverse, because she had acknowledged the property in question was the property of the plain-

tiff. The principle cited, does not, therefore, sustain the decision of the Court.

[3.] As instructed by this charge, the Jury were told, that though this testimony might prove that the possession was not adverse, at the period of which the witnesses testify, still, did the Statute continue to run against the plaintiff. We cannot assent to this doctrine; for we do not understand how the Statute could run, whilst the possession was not adverse. We are very sure, that if A holds property adversely to B, for a time, and the Statute commences to run in his favor, but afterwards, A acknowledges it to be the property of B, or attorns to him for it, to use a term properly applicable to real estate, which is very much the same thing, that the Statute will cease to run, from the time of such acknowledgment.

Let us put a strong case. A takes the slave of B—claims him as his own, and so holds him for several years; but afterwards, goes to B, and says, or puts such declaration in writing over his sign-manual, “I have done wrong in claiming this slave—he is yours—if I continue to hold him, it shall be for you.” Can it be doubted that this will effectually extinguish the operation of the Statute of Limitations, even if it had ran for the full time in favor of A? And that if A should subsequently take possession of the slave, in his own name, and again hold him adversely, the Statute would commence to run, necessarily, from the commencement of such subsequent or last adverse possession?

It is true, that there was no such explicit acknowledgment in the case at bar, but if what was said by Mrs. Goodwyn did, in the opinion of the Jury, amount to an acknowledgment at all, that she did not then claim the slaves, but that they were the property of her son, the principle is precisely the same, and the same effect must be given to the acknowledgment.

Judgment reversed.

No. 18.—NATHAN H. BEALL, executor, plaintiff in error, vs.
SAMUEL R. BLAKE, *et al.* defendants.

- [1.] There is a bill and a demurrer to it. The Court is about to decide the demurrer. Before it does so, however, the plaintiffs strike out a part of the bill. By leave, they afterwards re-insert what they had struck out. The defendants, after this, both plead, answer and demur to the bill, and after doing so, and on the trial before the Jury, and in the midst of the argument to the Jury, they move to have the amendment of the bill, containing the re-inserted matter, taken off the files: *Meld*, that the motion was properly over-ruled.
- [2.] Whether a specific legacy, if not illegal, has been adeemed or not, *depends* on whether the testator's *intention* has been to adeem it.
- [3.] In a bill against an executor, it is not, in general, necessary that the legatees should be parties.
- [4.] One whose interest in a bill does not appear, is not a proper party to the bill.

In Equity, in Houston Superior Court. Decided by Judge HARDEMAN, April Term, 1854.

The facts of this case, are as follows :

In 1834, Mrs. Rebecca Bostwick died testate, leaving a large estate. Her will contained sundry specific legacies, and the remainder was bequeathed to certain residuary legatees, of whom Mary Adeline Beall, who afterwards married Blake, the defendant in error, was one. Nathan H. Beall was her executor. After her death, a litigation arose between her legatees, and the legatees under the will of her former husband, Jacob Bostwick, in which the question was, how much of the estate she had the right to dispose of by will.

The result was a decree, that the estate (the whole of which Mrs. Bostwick had bequeathed,) should be equally divided; and that one half of it should be paid out, under her will, and the other half under the will of Jacob Bostwick.

The present case is a bill filed by Samuel R. Blake, in right of his former wife, (she being since deceased,) and by Nathan Allen, a trustee under her will, against Nathan H. Beall, ex-

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ecutor, for the residuary legacy of Mary Adeline Blake. The object of the bill, among other things, was to have the specific legatees under Mrs. Bostwick's will, to abate one half, in consequence of the decree before mentioned, so that the loss should fall, rateably, on them and on the residuary legatees. To this bill the defendant filed a demurrer, for want of equity, and for want of proper parties, none of the specific legatees being made parties, and for misjoinder of parties, in making Nathan Allen a party plaintiff. He also filed a plea, setting forth, that in the bill originally filed in this case, the same matter, in relation to the abatement of the specific legatees, had been set up; and that a demurrer was filed thereto, and that the Chancellor was about to give judgment for the defendant on demurrer, when the complainants struck out the matter in question from their bill; that defendant believing that the point had been abandoned by complainants, had gone on, in good faith, to pay out certain of the specific legacies; and that the matter had been again brought in, by way of amendment to the bill.

During the progress of the argument on the demurrer, a motion was made by defendant, to take this amendment from the files, "it having been improperly filed, and without proper leave of the Court" as the defendant insisted. As to this amendment, there had been made an order of the Court below, as follows:

"Samuel R. Blake <i>et al.</i> <i>vs.</i> Nathan A. Beall, executor.	}	<i>Bill, &c. in Houston.</i>
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On motion of complainant's Solicitor, ordered, that the order setting down the above stated case be opened, and that complainants have leave to amend their bill, in the case stated, and that they serve defendant with a copy of said amendment, in terms of the law".

Service of the amendment made on this leave—the amendment aforesaid, moved to be taken from the files—was acknowl-

edged by Whittle, Solicitor for defendant, on the 26th of October, 1853.

Which motion the Court refused, as coming too late. The Court likewise over-ruled the demurrer, and the plea, ordering the plea to stand for an answer; to which several decisions, the defendant excepted.

NISBET; WHITTLE, for plaintiff in error.

RUTHERFORD, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] Should the Court below, on the motion of the defendant in the bill, have ordered the amendment to be taken from the files?

The only reason assigned by the defendant for this motion was, that the amendment had, as he insisted, been “irregularly and improperly put in, the subject-matter having been before passed on.”

But it is not true, in point of fact, that the “subject-matter” of the amendment had been “passed on.” What is true is this: When the Court was about to give judgment—about to “pass on” that “subject-matter”, the subject-matter was, by the complainants, struck from their bill, and so the Court was *prevented* from giving such judgment.

Afterwards, the Court gave the complainants leave to amend their bill, and then they re-inserted this same matter in the bill.

The bill, thus amended, the parties went to trial, and whilst the argument was going on before the Jury, the defendant made this motion, to have the amendment taken off the files.

This motion, the Court over-ruled, as coming too late—coming after the filing of his “plea and demurrer”—the plea and demurrer to the bill as it stood, with this matter re-inserted in it.

That reason may, perhaps, have been sufficient, but if that was not sufficient, the other which existed was so, viz: its not

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having been true, as matter of fact, that the Court had "passed on" the "subject-matter" of the amendment was sufficient, taken in connection with the large power of the Court as a Court of Equity, to allow amendments. *Brown others vs. Redwyne and others*, (14 Ga. R. Decatur, 185

That the Court allowed the complainants to strike from bill the matters which they afterwards, by amendment, put into it, instead of being evidence of the Court's having passed judgment on those matters, is evidence of its not having done so: is evidence of leave, given by the Court to the complainants, to withdraw those matters from the danger of disqualification, and save them for use, if their use should be demanded on another occasion—is evidence of any thing rather than "retraxit."

In point of fact, then, there having been, as to the amendment, neither a judgment of the Court, nor a retraxit on the part of the party, and the time of the allowance of the amendment having been not too late, what existed to require the Court to refuse the amendment to be taken from the files? Nothing, as we can see.

One of the grounds of demurrer to the bill, is stated in words: "Because, by complainants' own showing, said I in right of his said wife, is only a residuary legatee under said will, while the legacy and negroes, bequeathed to said Powers, was specific: and it is illegal and inequitable that said specific legacy should abate in favor of a residuary legatee. Was this a good ground of demurrer?"

A testator's intention, if that is not illegal, is the law of the will. To this rule there is no exception, of which I am not aware. And yet I am aware, that in 1786, Lord Thurlow, as Chief Justice, in the case of *Ashburner vs. McGuire*, commenced making of an exception to it, and that in the course of a time afterwards, in the cases of *Badrick vs. Stevens* (3 1 C. R.) *Stanley vs. Potter* (2 Cox) and *Humphries vs. Humphries*, (2 Cox) he completed the work, as far as in him lay, to complete it.

In the last of these cases, he makes the announcement,

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He was satisfied, from the consideration he had given to the cases on a former occasion, that the only rule to be adhered to, was to ascertain whether the subject of the specific bequest remained *in specie*, at the death of the testator: and if it did not, that then there must be an end of the bequest: that the idea of discussing *what might be the particular motives and intentions* of the testator, in each case, in destroying the subject of the bequest, would be productive of endless uncertainty and confusion." (*Roper on Leg.* 244.)

Now a thing cannot be said to "remain *in specie*", a testator's, at the time of his death, if before that time he has sold it or otherwise parted with it, or if the thing has perished, or if it was never his, but was always another's, although he thought it to be his when he bequeathed it. Lord *Thurlow's* announcement comes, therefore, to this: that if a testator, after making his will, has sold the thing which constitutes a specific bequest, or has otherwise parted with it: or if the thing has, itself, perished; or if it was never his to bequeath, but was always another's, although he thought it his—in any of these cases, the specific bequest is adeemed—is so completely adeemed, that if the case be that the thing given has perished, there can be no replacement of it by an equivalent, in money or other thing; or if the case be, that the thing bequeathed has ceased to belong, or has never belonged to the testator, there can be made, by the executor with the true owner, no arrangement by which to render the thing subject to the bequest, no odds how manifest it may be, in the will, that the testator intended such replacement, or arrangement, whichever it might be, that the case should require.

This exception, thus declared by Lord *Thurlow*, to the old rule—the rule which makes the intention of the testator, if not illegal, the law to a will, was, in England, followed, in a number of cases, and in perhaps a still greater number, was not followed. Cases in which it has not been followed, or in which, in the opinion of *Roper*, it would not be followed, because too directly in the teeth of decided cases, are of the following kinds:

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Cases in which "the alteration of the fund is made by *mere act or operation of law*".

Cases in which "a breach of trust has been committed, or any trick or device practised, with a view to defeat the specific legacy".

Cases in which "the fund, instead of being annihilated, remains the *same*, or *in substance* the same, as at the date of the will"—as "if stock, specifically given, be merely transferred, with the testator's consent, from the name of the trustee into his own".

Cases in which "the testator lends the stock specifically bequeathed, on condition of its being replaced". (1 *Rop. Leg.* 240-1.)

Cases like that "in which A bequeathed the sum of 550*l.* then in B's hands," and in which "it appeared that before the will was made, A had placed that sum with B, and obtained his note for it", and in which "it appeared that A had also, *before* the making of his will, drawn several bills upon B, which reduced the 550*l.* to 430*l.*" (1 *Rop. Leg.* 445.)

Cases in which "an arrear of interest, due upon a debt at the date of the will, is specifically bequeathed, and the testator afterwards receives interest upon the principal sum", which he appropriates, "in discharge of interest accrued *after* the making of his will."

Cases like that of *Thomond vs. Suffolk*, in which "A being possessed of two bonds, the one for 2000*l.* from B, her grandson, and the other for 2000*l.* from C, her grand-daughter, bequeathed both securities to C, and declared, that if all or any part of the two sums should be *paid in* before her death, C should have 4000*l.* or so much money as the principal, *so paid in*, amounted to"; and in which "A *released* to B his bond debt, without receiving any of the money". (1 *R. Leg.* 245-6.)

Cases like that of *Pulsford vs. Hunter*, "in which A, after giving two small annuities, bequeathed as follows: 'this is an account of *value*, now in my possession, and out of which the said yearly sums are to be paid—bank notes to the amount of 190*l.*; cash, 10*l.* 10*s.*; ditto, in the hands of Mr. Drummond,

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2476*l.* 5*s.*; 2676*l.* 15*s.* the interest of the remaining part, to be applied for the use and education of my grand children, till they arrive at the age of 21, and the principal to be then equally divided between them," &c. and in which "it appeared that A had no cash in possession, at his death, but that he was possessed of two bank notes, amounting to 30*l.*; also, that Hunter, in January, 1779, and at A's request, left with Messrs. Drummond two navy bills, the property of A, to the amount of 2462*l.* 5*s.* 4*d.* and that in August, 1790, Government discharged the navy bills and interest, with seventeen exchequer bills, of 100*l.* each, and with 921*l.* 1*s.* cash, making a total of 2621*l.* 1*s.*—which exchequer bills remained in the hands of Messrs. Drummond, in the name of Hunter, and the 921*l.* 1*s.* placed to his account; that in September, 1780, Hunter drew a draft on Drummond, for 21*l.* 1*s.* in favor of testator, which was paid; and he afterwards took out the remainder of the sum, and bought nine other exchequer bills, of 100*l.* each, and left them with Drummond, in his own name, which made up twenty-six exchequer bills; that afterwards, sixteen of the exchequer bills were deposited with Drummond, at the testator's request, in his own name, and the remaining ten bills were paid to Hunter and another person, in satisfaction of a debt of 1000*l.*; and it appeared that the testator never had any property in the hands of Drummond, in his own name, except as before stated". And this case was determined by Lord *Thurlow*, himself. (1 *Rop.* 246-7.)

Cases in which a testator specifically bequeaths such goods as, at the time of making his will, he has in a particular house, but which goods, at his death, are not found remaining in that house—having been removed thence to save them from fire.

Or having been removed thence by fraud, or without the testator's knowledge.

Cases in which the goods specifically bequeathed, are, at the time of the making of the will, on board of a particular ship; but, at the time of the testator's death, are not found remaining in that ship—having been taken out of it.

Cases in which a person, having two houses, A and B, in

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which he alternately resides, and having but one set of furniture, which he carries with him to each house, as he removes from one to the other, bequeaths, while living at A, all his furniture at A, and dies while living at B, having all the furniture then with him, at B. It was again Lord *Thurlow*, himself, who decided a case of this sort. (1 *Rop. Leg.* 246-7.)

Cases in which the testator, after making his will, pawns, or pledges the thing specifically bequeathed, and dies without having redeemed it, or otherwise recovered possession of it.

Cases in which a partner specifically bequeathes "his share of the profits, (naming the *amount*,) and upon the expiration of the old" articles of copartnership enters into a new—such new articles as alter his share of the profits.

In cases of these kinds, it appears that Lord *Thurlow's* exception, is not to govern; and yet, they are kinds which fall within the very letter of it; for they are kinds of cases, in none of which is the specific thing bequeathed found "*remaining*", at the testator's death.

On the other hand, in numerous cases, not in any *materia* respect, as far as I can see, distinguishable from these, the exception has been followed. A reference to these may be found in *Roper on Leg.* 1, 238, and subsequent pages, and in the note to *Ashburner vs. Macguire*, in 1 *White & Tudor's Equity Cases*.

The upshot of this innovation of Lord *Thurlow*, was a state of evil so intolerable, that Parliament had, at length, to interpose with a Statute for its suppression. This Parliament did by Statute 1 *Vic. c.* 26, §23, which enacts, "that no conveyance, or other act, made or done subsequently to the execution of a will of, or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will, with respect to such estate, or interest in such real or personal estate, as the testator shall have power to dispose of by will, at the time of his death". And section 24, which enacts "that every will shall be construed with reference to the real estate, and personal estate comprised in it, to speak and take effect as if,

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had been executed immediately before the death of the testator, unless a contrary intention shall appear in the will".

The effect of these enactments must be, in a great measure, if not altogether, to suppress Lord *Thurlow's* innovation, and to make the old rule of its pristine breadth—to make it a rule without exception—the old rule, that the testator's intention gives law to his will.

That this rule was the rule in force, in England, before the time of Lord *Thurlow's* innovation, 1786, and at the time when the law of England was adopted by this State; and as much in force, in reference to the question of ademption, as to any other question that can arise on a will, is apparent from many decisions, and from whatever of authority there is in *Swinburne and Fonblanque*. (*Swin. on Wills*, 7 pt. ch. 20, and *Fonblanque's Equity*, bk. II. ch. II. §1.)

In *Partridge vs. Partridge*, Lord *Talbot* said, "all cases of ademption—of ademption of legacies, arise from a supposed alteration of the intention of the testator; and if the selling of the stock is an evidence to presume an alteration of such intention, surely his buying in again, is as strong an evidence of his intention that the legatee should have it again". (1 *White & Tudor's Eq. Ca.* 390.) To the same effect, more or less, are the following cases: *Orme vs. Smith*, 2 *Ver.* 681. *Crockett vs. Crockett*, 2 *P. Wms.* 165. *Rider vs. Wager*, 2 *do.* 330. *Ford vs. Fleming*, 2 *do.* *Earl of Thomond vs. Earl of Suffolk*, 1 *do.* 464. *Avelyn vs. Ward*, 1 *Ves. Sr.* 420. *Drinkwater vs. Falconer*, 2 *do.* 624. *Ashton vs. Ashton*, 3 *P. Wms.* 385. *Hambling vs. Lister Ambler*, 401. *Backwell vs. Child*, 1 *do.* 260. *Bronson vs. Winter*, *do.* 57. *Lawson vs. Stitch*, 1 *Atk.* 508. *Wingfield vs. Newton*, 9 *Mod.* 428.

This rule, then, being the one which was in force in England, at the time when Georgia adopted English Law, is, it may be assumed, the rule which Georgia adopted. And if her Courts had the power to leave it and to follow Lord *Thurlow*, ought they to do so, seeing the consequences which resulted from his being followed by the English Courts, a state of evil so great as to call for the redressing hand of the Legislature; and yet such

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a state of evil as, in the opinion of the Legislature, might be redressed, simply by a return to the old rule—ought they not rather to stick to this old rule? But they have no discretion. They must stick to it, for it is, to them, the law.

This being so, the question therefore is, what was the intention of Mrs. Bostwick, in making her will—her intention in reference to the ademption or non-ademption of the legacy to Miss Beall, (who has become Mrs. Powers,) in case the property bequeathed to her should turn out to be owned, in whole or in part, not by her, the testatrix, but by others? To answer this question, it is necessary to look to the will itself.

The will is in the following words:

“GEORGIA CLARK COUNTY:

In the name of God, amen. I, Rebecca Bostwick, being of sound and disposing mind and memory, do make and ordain this my last will and testament, hereby revoking all former ones.

First. It is my will and desire that all my just debts be paid.

Second. I give to Eliza Bostwick, daughter of John and Betsey Bostwick, of Louisville, One Thousand Dollars, subject, nevertheless, to this restriction: the said legacy shall remain in the hands of my executors, for the full space of four years from the date of their letters testamentary, for the purpose of defraying thereout the expenses of any law-suit, which may be commenced within that time, by the relations of my late husband, for the recovery of any of the property left by him to me. And if such suit should terminate in favor of my estate, then the above legacy, after deducting said expense, to be paid to Eliza—if unfavorable, then the said legacy to be null and void.

Third. I give to my niece, Frances Lumpkin Beall, now with me, the following negroes, to-wit: Owen, Moses, Abram, Anna and her four children, Sam, Lewis, Mary and her youngest one, whose name is not at present recollected, together with their future increase: also, Fifteen Hundred Dollars, for the purpose of educating her: and a mahogany bedstead, bed,

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mattress and furniture for the same, with my bureau and wash-stand.

Fourth. I give to my niece, Valinda Burton, a bed, mattress and furniture for the same.

Fifth. I direct that my farm, near Athens, be sold, together with the farming utensils thereon, and the money arising therefrom, be equally divided between my sister Eleanor and Tabitha J. Groves.

Sixth. The remainder of my estate, both real and personal, including money, debts, dues and demands, it is my will and desire, should be divided into four equal shares, and distributed in the following manner: To my sister, Mary Hodges, and son Robert, one share; to my sister, Eleanor Harris, and son Thomas, one share; to my sister, Tabitha J. Groves, and daughter, Valinda R. Burton, one other share; to my brother, Nathan H. Beall, and my niece, Mary Adeline Beall, the remaining last share, on the following conditions, to-wit: that in the event of the death of any one or more of said legatees, without any heir of their body, the portion of the one so dying, then to go to the survivor who shared with the one so dying; and at the death of such survivor, if no heir of their body be living, for said property, together with their former share, to return and be considered a part of my estate, and divided equally between my surviving sisters and brother, except that share given to my brother, Nathan H. Beall, and niece, Mary Adeline; the only condition on which any of that property is to return, is at the death of Mary Adeline, without an heir of her body, that her portion be subject to an equal division between my sisters and brother, and their children.

Seventh. I do hereby constitute and appoint James Beall, James A. Groves and Nathan H. Beall, executors to this my last will and testament. And lastly—the law will not allow me to manumit my two faithful servants, Step and his wife Sibby, but I now call on you, my relations, and especially those whom I have remembered in this my last will, to remember me, and regard this as my dying request, to see that they are, from

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and after the 25th day of December next, no more to be in slavery, but to give them their liberty, and to protect in its enjoyment, and to make up to them the sum of Four dred and Fifty Dollars, for the purpose of better ena them to settle themselves."

It appears, that at the time when Mrs. Bostwick made will, there was in existence a will of her late husband, J. Bostwick, which, among other bequests, contained this give and bequeath unto my dearly beloved wife, Rebecca wick, after all my just debts are paid, the whole of my e both real and personal, to reap the profits thereof, during widow hood: but in the event of her marriage, then, and in case, she is to have only one-half of the aforesaid estate, at her own disposal, and the other half to be divided bet my sister, Betsey Bostwick, my brother Littleberry Bost and my brother Nathaniel Bostwick's son, James Beall wick, &c. in certain named proportions.

Now, this bequest, in this will, is very plainly what Bostwick has reference to, in the second item of her will, she says that the bequest of the \$1000 therein given to Bostwick, daughter of John and Betsey Bostwick, (Betsey ing one of the said legatees in Jacob Bostwick, the husb will) is given, subject to the restriction, that the legacy remain in the hands of her executors for four years, the of it the expense of any law-suit, which might be comm within that time, by the relations of her late husband, J. Bostwick, for the recovery of any of the property left by to her; and she has reference to the bequest, as what in the foundation of a possible suit to be brought against her utors by her husband's "relations", for the recovery of sor perhaps all of the property, left to her by that husband.

While making her will then, Mrs. Bostwick has in her the claim which her late husband's relations may set up ag her executors, for the property, or some part of it, whic is disposing of by the will which she is engaged in making.

Having this possible claim in her mind, she makes one o bequests in that, her will, depend upon how the claim, if a

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ed, might be decided, namely: that bequest of \$1000 to Eliza Bostwick, who was the daughter of one of those "relations" of her husband, to whom she referred as possible parties to set up the claim, saying, that if the suit on that claim should result in favor of her estate, the bequest, after deducting from it the expenses of the suit, is to be paid to Eliza, the legatee: if not in favor of her estate, the bequest is to be null and void—that is to say, the bequest is to be considered as "adeemed."

Having this possible claim in her mind, she adeems, conditionally, one legacy—adeems it on condition that the claim, if asserted, shall go against her estate; and she adeems conditionally, or otherwise, no other legacy whatever—she makes no provision for any further change of any sort.

Is it not clear, then, that she *intended* no further change of any sort? Is it not clear that she intended the other legatees to have their legacies, whether her husband's relations should set up a claim or not, or whether the claim, if set up, should result for or against her estate? The expression of one thing is the exclusion of another.

This being so, it follows, that if the legacy to Mrs. Beall, who afterwards became Mrs. Powers, was adeemed at all, it was not adeemed by the testatrix, Mrs. Bostwick, but was adeemed by something acting contrary to her intention.

Was there any such something to adeem it? The defendants in error insist that there was. They insist that the testatrix owned no more than one-half interest in the negroes, which she bequeathed to Mrs. Powers: the other half having been owned, as they say, by her "husband's relations"—the Bostwick's, and that she, therefore, was prevented, by this deficiency of her estate in the negroes, from conveying to Mrs. Powers any thing more than a half interest in them.

Was there any such something to adeem the legacy? The defendants in error insist, that as to one-half of the legacy, there was, namely, this: that she, the testatrix, did not own more than an undivided half of the negroes constituting the legacy. They say that the other undivided half, her "has-

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band's relations", the Bostwicks, owned. This they insist to be so, by reason of the following state of things :

After the death of the testatrix, Mrs. Bostwick, it appears that her "husband's relations", the Bostwick's, did set up the claim to her estate, which she apprehended they would, and that her executor, Nathan H. Beall, after they had done this, brought a bill of interpleader against them, and also against the persons claiming as legatees under her will, in which he prayed that the respective sets of claimants might interplead and adjust their rights among themselves, and that he might be directed, by decree, "to which of said claimants to pay the said property and effects, and each and every part thereof." And that upon this bill, the Jury found the following verdict: "We, the Special Jury, find and decree one-half of the estate of Jacob Bostwick, deceased, in favor of the legal representatives of Rebecca Bostwick, and the other half of said estate to be divided as follows, viz: " &c. (among the Bostwicks.) That by agreement of the legatees under Mrs. Bostwick's will, among themselves, this verdict was changed, by taking out of it the words "legal representatives of Rebecca Bostwick", and putting in their place the words, "legatees of Rebecca Bostwick".

This is the state of things from which it results, as the defendants in error insist, that at least one-half of the legacy to Mrs. Powers was adeemed—a state of things, which, as they contend, shows that even if Mrs. Bostwick's intention was to give the whole of each of the negroes of the legacy to Mrs. Powers, the intention was such as could have no effect, because, as they contend, the verdict says, that one-half of each of those negroes she did not own, and the law says that nobody shall will away property which he does not own.

Are the defendants right in this?

What interest did Mrs. Bostwick, the testatrix, have in the property—the negroes of the bequest? What power of bequeathing that property did such interest, whatever it was, give her?

It appears that the whole property bequeathed by Mrs.

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Bostwick, had been of "the estate of Jacob Bostwick", deceased, her late husband—that on his decease, it came from him to her.

The interest which she had in the property, the verdict finds to have been at least this much: that of a tenant in common or a joint tenant—a tenant in common or a joint tenant with the Bostwicks—for it finds one-half of the property "in favor" of those to whom she had given it by her will, and the other half "to be divided" among the Bostwick's, and no interest in her less than that of such a tenant would have been large enough to support such a gift of hers.

Assuming, then, that the testatrix, Mrs. Bostwick, was a tenant in common, or a joint-tenant with the Bostwicks in the property, had she the power to bequeath any specific part of the property, so as to convey the entire interest in such part?

It is, perhaps, true, that no tenant in common, or joint tenant, has power so to convey the common or joint property, as to divest the interest of his co-tenant, without the co-tenant's consent. With the co-tenant's consent, however, any such tenant has the power.

Did the testatrix, Mrs. Bostwick, have the consent of the Bostwicks, her co-tenants, to this specific bequest to Mrs. Powers?

Their conduct shows that she did. First, they accepted the verdict of the Jury, and that verdict said, in effect, that the will of her, Mrs. Bostwick, was to be carried into effect, as far as that was practicable, considering that she had but an undivided half interest in the property willed. The verdict, after being changed, by agreement, said that her "legatees" were to have their legacies, if those legacies could be got out of only half of the property—and the nature of those legacies was such that they could all be got out of one-half of the property, if, in the division of the property between the tenants in common, viz: the Bostwicks and her legatees, the part of the property constituting the specific bequests in the will, should be allowed to go into that half which should be allotted to the legatees. The legacies were general, except this to Mrs. Pow-

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ers and a few others, of no great value. The whole amount of all the specific legacies, was not, by a great deal, equal to one-half of the whole property. One divided half, then, of the whole, if the half which contained in it the property that constituted the specific bequests, would be sufficient to satisfy those bequests, and also the general bequests; for these latter, by the will, were not to be of this particular amount or that, but were to be whatever the residue of the property, after the payment of the specific legacies, would admit of their being. The verdict said, in effect, to the Bostwicks—"in the division, let the property constituting the specific bequests, go into the share of the legatees, that, thus, the will may be satisfied". And to this verdict, the Bostwicks consented. They made no objection to it. And therefore, they were bound by it. And to consent to the verdict, is the same as to consent to the will; which, indeed, it seems the verdict, in this particular, merely intended to adopt.

Secondly. But the Bostwicks, not only in this way, by consenting to the verdict, consented to the will—they did so in a more direct way—they actually agreed, with the executor, to such a division of the property, as threw the negroes composing this specific bequest to Mrs. Powers, into the share which he, as executor, was to retain; and thus, they actually agreed that he might administer those negroes, as if Mrs. Bostwick, the testatrix, had had the entire interest in them. And accordingly, the executor did, in fact, turn over those negroes to Mrs. Powers, or to her husband. This certainly, of itself, without any help from the verdict, or from the acceptance of the verdict by the Bostwicks, amounted to a consent, on the part of the Bostwicks, to the bequest of the negroes to Mrs. Powers, made by Mrs. Bostwick—amounted to a ratification, by them, of that bequest. This division with the executor, was the same, in legal effect, as would have been a similar division with Mrs. Bostwick, herself, made after the date of the bequest, had one, after that, been made with her. Suppose such a division to have been made with Mrs. Bostwick, herself, and afterwards, she had died without changing her will, leaving,

among the negroes which she had obtained as her share in the division; these negroes bequeathed to Mrs. Powers, would it be possible to doubt the validity of the bequest of them to Mrs. Powers—the validity of the bequest, of not merely a part, but of the whole undivided interest in the negroes?

The case, as it stands, in reality, is not substantially different from this supposed case.

The testatrix, Mrs. Bostwick, then, *did* have the consent of her co-tenants, the Bostwicks, to this specific bequest to Mrs. Powers.

This being so, and her *intention* having been seen to be not to adeem this specific bequest, whether the Bostwicks should sue her executor, and recover from him an undivided half, or any other portion of the property, willed or not, it follows that that bequest is not adeemed, in whole or in part, but remains, in its entirety, good, to Mrs. Powers.

But it was said, for the defendants in error, that this conclusion is in the teeth of *Webb vs. Webb*, 2 Ver. 110. There is, however, a wide difference between that case and this. *First*. It does not appear, in that case, that Webb, the testator, was, at the time when he was making his will, conscious of the existence of the custom of London, which would give his widow “one entire moiety” of his personal estate—that estate, part of which he was bequeathing in specific legacies—much less does it appear that he was both conscious of the custom, and made his will in reference to it—made his will with the intention that it was to be the same, whether the custom should be asserted against it or not; whereas, in this case, it appears that the testatrix, Mrs. Bostwick, was conscious of the existence of the claim of the Bostwicks, to an interest in the property she was bequeathing; and also conscious of the possible, if not probable, adverse result to her estate, of the assertion of that claim; and that thus conscious, she made her will in reference to the existing claim, and the possible, if not probable, result; and that so making the will, she made it with the intention that it was not to be varied at all, in respect to this spe-

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cific legacy, by the existence of that claim, or the nature of that result.

Secondly. In that case, the *widow* never *consented* to the bequest—never consented to any thing which was equivalent to consenting to the bequest. On the contrary, she asserted her right to the very things which, by her husband, had been specifically bequeathed. Had the widow consented to the specific bequests, can there be a doubt that the decision would have been just the reverse of what it was? Would it have lain in the mouth of general legatees to say—Custom of London? In this case, the Bostwicks—the co-tenants of the testatrix, in the property bequeathed by her, consented to the bequest of it—consented to what was equivalent to consenting to that—consented to such a division of the whole common or joint property, as would leave in her severed share, the part she had specifically bequeathed. The cases, then, not being at all alike, *Webb vs. Webb* does not disturb the conclusion to which we had come.

[3.] This being a suit against an executor, legatees were not necessary parties to it. They were represented by him. This is the general rule. (*Calvert on Parties*, 20.) In this case there is nothing peculiar, to take the case out of the general rule.

[4.] Allen was not a proper party to the bill. There is not one allegation in it, that relates to him, unless an order to make him a party as trustee, amounts to an allegation that he is trustee. Therefore, it does not appear that he has any interest in the bill; and that one whose interest in a bill does not appear in the bill, is not a proper party to it, is too obviously true to need proof.

[5.] The plea was well over-ruled. This was shown, in showing the motion to have been well over-ruled.

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discharge, under the Honest Debtor's Act, exempts only the body of defendant from arrest, at the instance of the creditors who were parties to the proceeding.

If the property which the debtor owned, at the time of his discharge, was included in his schedule or not, is subject to the judgments. The Court is authorized to be formed, under the Insolvent Laws of this State, is to make a disclosure of concealed effects, and not to try the title to property in the hands of third persons.

A fraudulently transfer property to B, to avoid the payment of his debts, the remedy by garnishment, against B, is not so full and complete as the remedy in Chancery.

Under a creditor's bill, filed against a third person, to reach and appropriate to the payment of the debts, a fund belonging to the defendant, a Court of Equity can better distribute the fund than a Court of Law, under a garnishment.

A Court of Equity will extend to one who is not a party to the bill, the right of becoming a party, at his own instance, when, from the case made, it sees that the ends of justice would be subserved by it.

Equity, from Bibb Superior Court. Decided by Judge WESSON, May Term. 1854.

There was a bill filed by certain creditors of William J. Stephens, setting forth that they had sold to said Stephens, merchandise to the amount of Six Thousand Dollars; that they obtained judgments on their claims, and *ca. sas.* had been levied against Stephens, and he had been discharged under the Insolvent Laws. Pending suit, garnishments had been served on William Phillips, to which he answered, denying owing anything to Stephens, or having any effects of his in hand. The error was not traversed, nor was any judgment or other process, in relation to the garnishment.

The bill further stated that Stephens had sold out the goods of T. Smith, taking his note therefore; that the sale was completed, and that in order to keep the goods from his creditors

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tors, Stephens placed Smith's note in the hands of Phillips, who delivered it to Smith, and received the goods, ostensibly, for himself; but, as the bill charged, really for the benefit of Stephens, to be held in secret trust for him; all which was previous to the garnishment, or the discharge of Stephens from arrest, as aforesaid. The object of the bill was, to make Phillips liable for these goods, or their value, to the creditors. To this bill a general demurrer, for want of equity, was filed, as also a special demurrer, because Stephens was not made a party.

The demurrer, on both grounds, was over ruled by the Court, and this decision is excepted to.

STUBB & HILL, for plaintiff in error.

LANIER, ANDERSON and RUTHERFORD, for defendant.

By the Court.—LEMPRIN, J. delivering the opinion.

In the opinion of this Court, Counsel for the plaintiff in error misapprehended the nature of complainant's bill. They assume that it is filed to set aside the judgment of discharge, in favor of Stephens, under the Insolvent Laws, and the proceedings in garnishment, against Phillips. And consequently, they treat the bill as though it were filed, to set aside judgments at Law; and it is demurred to in that respect. Such is not its object.

[1.] What was the effect of the discharge, under the Honest Debtor's Act? Nothing more than to exempt the person of Stephens from future arrest.

[2.] It is not disputed but that the property which he owned at the time, or might subsequently acquire, would be liable to seizure and sale, under the complainant's judgments, which were then of force against him. *The Mayor and Council of Rome vs. Dickerson*, (13 Ga. R. 302.)

Indeed, such is the express provision of the Act of 1801, which was passed to carry into effect the 7th section of the 4th article of the Constitution of 1798. While it exempts the body

of the debtor from arrest, it declares that nothing therein contained, shall prevent any creditor to have execution, at any future time, against the property, both real and personal, of the insolvent debtor. (*Cobb's Dig.* 381.)

This discharge, then, is not at all in the way of these creditors. There is no attempt, by them, to interfere with the liberty of the debtor. They are foreclosed from doing that.

What, then, is the object of this bill? It is to subject assets which cannot be reached at Law, owing to the peculiar circumstances of the case. The creditors want both discovery and relief. And I repeat, the judgment of discharge does not stand in their way: nor is this an attempt to vacate it.

[3.] As to the garnishment which was sued out against Phillips, that occupies a different footing. He deposed that he owed Stephens nothing, and that he had nothing of his, in his hands. This affidavit was not traversed, and there the proceeding stopped. There was no judgment entered up, discharging the garnishee, nor for any other purpose. Here again, then, there is no insuperable obstacle to be surmounted.

[4.] But it may be asked, if this proceeding be still open and pending, instead of filing this bill against Phillips, why not prosecute the garnishment? The answer is two-fold. In the first place, it is too late to traverse the deposition of Phillips, and to take issue with him, upon the facts therein affirmed. And a satisfactory reason is rendered in the bill, why it was not done at the proper time, namely: that the creditors, notwithstanding their vigilance, in ferreting out these effects, were not prepared, with proof, to controvert the return successfully. They had watched for these goods, and had a suspicion, that when Smith delivered them up, that they went into the custody of Phillips. Hence the garnishment which they caused to be served upon him. Having positively denied the fact, they abandoned further pursuit. They have recently learned, however, that they were on the right track. But the time has elapsed for taking issue upon this return.

But there is a technical difficulty which cannot well be overcome, as to this remedy by garnishment. Admitting all the

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facts charged in the bill to be true, Phillips, perhaps, could safely swear, that he owed Stephens nothing, and that he had nothing of his in his hands. For this being a fraudulent arrangement between them, to defeat the creditors, Phillips is not liable to account to Stephens, although he may be to the creditors. And notwithstanding the transfer, by Stephens, may be a nullity, as to his creditors; still, it will be perceived that the process of garnishment does not make and meet the issue fairly. At any rate, this legal remedy is not complete. Phillips might swear, in answer to the garnishment, that he owed Stephens nothing; yet, if he admitted the facts charged in the bill, he would subject himself, undoubtedly, not to a prosecution for perjury, on his former oath, but to a decree in favor of the creditors of Stephens, to account for these goods, or their value.

The remedy at Law, is not so full, in another respect. This is a creditor's bill, and should a recovery be had, a Court of Equity will be the most appropriate forum, for distributing this fund amongst the claimants.

Having ascertained that is not a bill to set aside proceedings at Law, none of the rules applicable to that class of cases, apply to it—such as diligence, the annexation of the affidavit of Stephens, &c. In other words, this is not a bill of review, to obtain a new trial or stay proceedings at Law: but an original bill, founded on its own peculiar equity: and which, if the charges in it be true, and the demurrer admits them, is by no means deficient in equity. Let a single fact suffice to prove this: Phillips, the defendant, has got into his possession \$6,000 worth of property, belonging to Stephens, to be disposed of for his benefit, with adequate compensation, of course, for his services. And this bill appeals to his conscience to establish the fact, and to a Court of Chancery, to compel him, by its decree, to disgorge these effects. Would a Court of Equity be deserving of the name, which confessed itself inadequate to grant the relief sought?

[5.] So much for the general demurrer. There was also a special demurrer, because Stephens was not a party.

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This objection does not lie in the mouth of the defendant. What is it to him, if Stephens be not joined in this proceeding? But to protect the rights of Mr. Stephens, who is interested in showing that these judgment debts are paid, in whole or in part, or for some other reason, that they are not valid and operative, as well as to bind him, by the decree which may be rendered, an opportunity should be afforded him, of voluntarily being made a party.

We shall sustain, then, the judgment of the Superior Court; and require Mr. Stephens to be notified of the pendency of the suit, with the privilege of coming in and being made a party defendant, if he see fit.

No. 20.—MARGARET RILEY, adm'x of William Riley, deceased, plaintiff in error, *vs.* LEWIS L. GRIFFIN, GEO. W. ADAMS and others, defendants.

- [1.] A possession which is the result of ignorance, inadvertence, misapprehension or mistake, will not work a disseizin.
- [2.] Marked trees, as actually run, must control the line, which courses and distances would indicate.
- [3.] If nothing exists to control the call for courses and distances, the land must be bounded by the courses and distances of the grant, according to the Magnetic Meridian: but courses and distances must yield to natural objects.
- [4.] All lands are supposed to be actually surveyed; and the intention of the grant is, to convey the land according to that actual survey.
- [5.] If marked trees and marked corners are found, distances must be lengthened or shortened, and courses varied so as to conform to those objects.
- [6.] Where the calls of a deed or other instrument, are for natural, as well as known artificial objects, both courses and distances, when inconsistent, must be disregarded. And this rule is supposed to prevail, in most of the States of this Union.
- [7.] Whenever a natural boundary is called for in a grant or deed, the line

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is to determine at it: however wide of the course called for, it may be, or however short, or beyond the distance specified.

- [8.] Whenever it can be proved that there was a line actually run by the surveyor, or was marked, and a corner made, the party claiming under the grant or deed, shall hold accordingly, notwithstanding a mistaken description of the land in the grant or deed.
- [9.] When the lines or courses of an adjoining tract are called for in a deed or grant, the lines shall be extended to them, without regard to distances, provided these lines and courses be sufficiently established.
- [10.] When there are no natural boundaries called for, no marked trees or courses to be found, nor the places where they once stood, ascertained and identified by evidence; or where no lines or courses of an adjacent tract are called for, in all such cases. Courts are of necessity confined to the courses and distances described in the grant or deed.
- [11.] Courses and distances occupy the lowest, instead of the highest grade, in the scale of evidence, as to the identification of land.
- [12.] Any natural object, and the more prominent and permanent the object, the more controlling as a *locator*, when distinctly called for and satisfactorily proved, becomes a land-mark not to be rejected, because the certainty which it affords, excludes the probability of mistake.
- [13.] Courses and distances, depending for their correctness on a great variety of circumstances, are constantly liable to be incorrect; difference in the instrument used, and in the care of surveyors and their assistants, lead to different results.
- [14.] In ascertaining boundaries, the locations of the original surveyor, so far as they can be found, are to be resorted to; and where they vary from the proprietor's plan, the locations actually made, will control the plan.
- [15.] Whenever, in a conveyance, the deed refers to monuments, actually erected as the boundaries of the land, it is well settled that these monuments must prevail, whatever mistakes the deed may contain, as to courses and distances.
- [16.] Courses and distances are pointers and guides, rather to ascertain the natural objects of boundaries.
- [17.] Where a given line is exceeded in a grant, according to the courses and distances, evidence may be given of long occupation under it, to prove the boundaries.
- [18.] Boundaries and courses may be proved by hearsay, from the actual necessity of the case.
- [19.] Where a line has been run and agreed on by the co-terminous proprietors, and acquiesced in and possession held to it, for eighteen or twenty years, the parties and those claiming under them, are bound by it, no matter when, nor by whom, the line was run.

Ejectment, in Bibb Superior Court. Tried before Judge POWERS, May Term, 1854.

This action was brought by the defendants in error, against the plaintiff in error, to recover a lot of land in the County of Bibb.

The plaintiffs in the action, introduced a grant from the State to Lewis L. Griffin, one of the lessors of the plaintiff, dated in 1836, to fractional Lot No. 3, in said county, and introduced testimony, showing that the grant covered the premises in dispute, and that defendant was in possession, at the time of bringing the writ.

Defendant introduced a deed from Willis Wilder to O. H. Prince, dated in 1835, and a deed from Prince to Wm. Riley, her intestate, dated in 1845, for part of fractional Lot No. 2, Macon Reserve. Defendant introduced testimony, going to show that this deed covered the premises in dispute, (the lots adjoining) and also to show possession and claim of ownership, since 1836.

Defendant also introduced Warren B. Riley, the son of intestate, whose testimony was as follows :

" I have known the premises in dispute, since 1835 or 1836. My father was in possession of the premises, since 1835 or 1836, first as the agent of Maj. O. H. Prince, and after the death of Prince, he bought the land at Prince's sale, and remained in possession until his death ; and his widow and administratrix has been in possession ever since, and is now.

During the lifetime of Prince, father always held possession as his property, using it as such ; and after he bought it, used it as his own ever since, cultivating it and exercising acts of ownership over it, as his own.

I know the lines well ; I know the line is the old original line ; have frequently seen the old blazes on the trees, which had all the appearance of the original Surveyor's mark. The owners of the adjoining lands set it up as the original line, and were governed by it, and no dispute about it until Adams bought the adjoining land.

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If this land is not covered by the deeds from Wilder to Prince, and from Prince's administrator, (W. Poe) to Wm. Riley, then there is no land, whatever, that can be claimed under the deeds.

All the parties acquiesced in agreeing to the line, as fixed and known, until Adams bought, and then Brantly, (Adams' father-in-law,) made a fuss about the lines, in a Justice's Court. Riley was in possession of the premises in dispute, occupying it and using it as his own, when Adams bought fractional Lot No. three, which they claim to cover the place sued for".

After argument, the Court charged the Jury as follows :

This is a question of boundary. If you believe, from the evidence, that the premises in dispute are covered by the grant from the State to Lewis L. Griffin, then you will find for the plaintiff.

And if you believe, from the evidence, that defendant went into possession of the premises in dispute, under a mistaken apprehension, as to the real boundary, when, in fact, the premises were not covered by his deed, possession and user of it, as his own, under such misapprehension, for seven years, does not confer title, as against the true owner : and so, if you believe that plaintiff's grant covers the premises in dispute, you will find for plaintiff ; otherwise, you will find for defendant.

Defendant's Counsel requested the Court to charge the Jury, that if Riley, and those under whom he claims, had been in the actual possession of the premises in dispute, for more than 7 years before suit brought, claiming it as his own, by himself and those under whom he claimed, and cultivating it and exercising acts of ownership over it—

That such possession, under the case made by the evidence, (if the Jury believed the testimony,) conferred a good title in defendant, and the Jury would find for defendant, if they believed the evidence, as to the possession. The Court refused so to charge, but did charge, that a purchase of Lot No. 2, and going into possession of Lot No. 3, conferred no title to No. 3 ; and 7 years' open, adverse possession of No. 3, did not convey title to No. 3, against the true owner, because not *bona*

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for, under claim of right, and adverse to the true owner. The party making such a mistake, does so at his peril—if such mistake, in your opinion, from the testimony, was made.

The Jury found, for the plaintiff, the premises in dispute.

Which said charge, and refusals to charge, defendant, by her Counsel, then and there excepted, and now assign the same for error.

STUBBS & HILL; WHITTLE, for plaintiffs in error.

RUTHERFORD; POE; NISBET & POE, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We recognize the doctrine, that a possession which is the result of ignorance, inadvertence, misapprehension, or, in other words, mistake, will not work a disseizin—as, for instance, A has a grant to Lot No. 2; he is a stranger in the country, and calls upon some one residing in the vicinity of his land, who points out No. 3 instead of No. 2. A, acting upon this mistake, and not intending to occupy any other land than that which his grant covers, enters upon No. 3 and lives on it as his own for more than seven years. An occupancy, under such circumstances, would not, we apprehend, constitute adverse possession. *Brown vs. Gray*, (3 *Greenleaf's R.* 126.)

It is the *intention* to claim title which makes the possession of the holder adverse; and this is the doctrine upon which the decision in every case proceeds. If it be clear, therefore, that there is no such intention, there can be no pretence of an adverse possession. (*Angell on Limit.* 402, 412.) If one be the owner of a tract of land, and at the same time the agent of the owner of an adjoining tract, he cannot avail himself of the Statute, to support his title to a part of the land of his principal, of which he had taken possession upon a misapprehension of the boundary. (*Cornegis vs. Carley*, (3 *Watts Rep.* 280.)

Whether there be any evidence to justify the charge, that

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the defendant's occupancy, in this case, may have been the result of mistake, is somewhat questionable.

But there is another portion of the charge, which requires more consideration. The Court instructed the Jury, that if Griffin's grant covered the premises in dispute, then the verdict must be for the plaintiff.

Is this proposition necessarily correct? We think not.

Let us refer, for a moment, to the testimony of young Riley and Jonathan Wilder. Warren B. Riley swears, that he has known the premises in dispute since 1835 or 1836. His father has been in possession since that time, first, as the agent of Major O. H. Prince, and afterwards, in his own right—he having become the purchaser of the property, when sold as the estate of Major Prince, by Col. Poe, the administrator. That either as agent of Prince, or in his own right, he had always held the land, exercising acts of ownership over it, by cultivating it, &c. This witness testifies, that he knows the lines well, and that the line to which his father claimed, was the old original line. He has frequently seen the old blazes and trees which had all the appearance of the original Surveyor's marks. That the owners of the adjoining lands set it up, as the original line, and were governed by it, and there was no dispute about it, until Adams bought the adjoining land. He further stated, that all the parties, that is, those residing on the contiguous tracts, acquiesced in the line as fixed, until Adams bought; and then Brantley, Adam's father-in-law, made a fuss about the line in a Justice's Court.

Jonathan Wilder swore that he acted as the agent of his uncle, Willis Wilder, who owned the land before Major Prince bought it. That at the time it was sold, the blazes made by the Surveyor who run the land, were plain on the trees; and that he followed the original marks. That Riley's fence is nearly on the line as run round by witness. That it is a little over at the corner, as well as he can recollect, judging from his eye and from memory: subsequent examination has confirmed him in this opinion. He knows he is not mistaken as to the lines, because he followed the original Surveyor's marks, then fresh

and plain on the trees, which were then standing, very few, if any, having been cut down. Prince and Riley, together, have been in possession of the land, for the last eighteen or twenty years, claiming it as their own, under Willis Wilder. There never was any dispute about the boundary, while witness controlled it, as the agent of his uncle. Witness has known the place, ever since the original survey was made, and before that time; has often seen the original Surveyor's marks, and could trace the original lines by them, and did so.

[2.] Now, it would seem, according to the proof, that when Lot No. 2 was originally surveyed, the lines may not have been run straight, according to courses and distances. But still, if the Surveyor marked these as the true lines, it is quite clear that the owner of No. 2 will hold to these boundaries. Marked trees, or the line, as actually run, must control the line which courses and distances would indicate.

[3.] If nothing exists to control the call for course and distance, the land must be bounded by the courses and distances of the grant, according to the Magnetic Meridian; for it is the practice, undoubtedly, of Surveyors, to express, in their plots and certificates of survey, the courses which are designated by the needle. But it is a general principle, that the course and distance must yield to natural objects called for in the grant.

[4.] All lands are supposed to be actually surveyed; and the intention of the grant is, to convey the land, according to that actual survey.

[5.] Consequently, if marked trees and marked corners be found, distances must be lengthened or shortened, and courses varied, so as to conform to these objects. *McIver's Lessee vs. Walker*, (9 Cr. R. 173.)

[6.] Where the calls of a deed or other instrument, are for natural, as well as known artificial objects, both courses and distances, when inconsistent, must be disregarded. And this rule, says Mr. Justice *Washington*, is supposed to prevail in most of the States. *McPherson vs. Foster*, (4 Wash. C. C. Rep. 15.)

[7.] Whenever a natural boundary is called for in a grant

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or deed, the line is to determine at it, however wide of the course called for it may be, or however short, or beyond the distance specified.

[8.] And whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the grant or deed, shall hold accordingly, notwithstanding a mistaken description of the land in the grant or deed.

[9.] When the lines or courses of an adjoining tract, are called for in a deed or grant, the lines shall be extended to them, without regard to distance, provided these lines and courses be sufficiently established.

[10.] Where there are no natural boundaries called for—no marked trees or corners to be found, nor the places where they once stood, ascertained and identified by evidence; or where no lines or courses of an adjacent tract are called for—in all such cases, Courts are, of necessity, confined to the courses and distances prescribed in the grant or deed; for however fallacious such guides may be, there are none other left for the location. *Cherry vs. Slade's Adm'r*, (3 *Mur. R.* 82.)

The foregoing rules, Chief Justice *Taylor* remarked, had grown out of the peculiar exigencies of the country, and were moulded by experience, to meet the demands of justice.

[11.] And thus, it will be seen that courses and distances occupy the lowest grade, instead of the highest, in the scale of evidence, as to the identity of land.

[12.] And it is reasonable that this should be so; for any natural object, when called for distinctly, and satisfactorily proved—and the more prominent and permanent the object, the more controlling as a *locator*—becomes a landmark not to be rejected, because the certainty which it affords, excludes the probability of mistake:

[13.] While course and distance, depending, for their correctness, on a great variety of circumstances, are constantly liable to be incorrect. Difference in the instrument used, and in the care of Surveyors and their assistants, lead to different results. (*Lessee of McCay vs. Galloway*, 3 *Ham.* 282. *Thorn-*

berry vs. Churchill and Wife, 4 *Monroe's Ken. R.* 32. *McNeill vs. Massey*, 3 *Hawk. R.* 91. *Beard's Lessee vs. Tul-lot*, 1 *Cook*, 142. *Preston's Heirs vs. Benman*, 6 *Wheat*. 58.)

This doctrine is found scattered, broadcast, throughout the authorities ; and I had supposed to be too well understood and established, to require to be discussed at this day.

[14.] In *Brewer vs. Gay*, (3 *Greenleaf's R.* 126,) it was held, that in ascertaining the boundaries of lots of land, where a township has been laid out, the locations of the original Surveyor, so far as they can be found, are to be resorted to ; and where they vary from the proprietor's plan, the locations actually made will control the plan.

[15.] So, in *Dodge vs. Smith*, (2 *N. Hamp. R.* 303,) the Supreme Court say, "whenever, in a conveyance, the deed refers to monuments actually erected, as the boundaries of the land, it is well settled that those monuments must prevail, whatever mistakes the deed may contain, as to the courses and distances. The same principle was decided in *Brand vs. Dawny*, (20 *Marten's Lon. Rep.* 159.)

[16.] In *Doe vs. Paine & Sawyer*, (4 *Hawk's N. Rep.* 64,) the Court refer to courses and distances, as pointers or guides merely, to ascertain the natural objects of boundary.

[17.] So, also, it has been held, that where a given line is exceeded in a grant, according to the courses and distances, evidence may be received, of long occupation under it, to prove the boundaries. (*Makepeace vs. Bancroft*, 12 *Mass. R.* 469. *Sargent vs. Town*, 10 *Mass. Rep.* 303. *Baker vs. Sander-son*, 3 *Pick. R.* 354. *Livingston vs. Ten Broeck*, 16 *Johns. R.* 23.) *Vide Davies' Abrid. of Am. L. vol. 3, p. 307*, where some of the early cases decided in Massachusetts, upon this subject, are collected.

[18.] And, as landmarks are frequently formed of perishable materials, which pass away with the generation in which they are made ; and are often destroyed, as in the case before the Court, by the improvement of the country and other causes, the boundary and corners may be proved by hearsay, from the necessity of the case. (*Nicholls vs. Parker*, 14 *East.* 331.

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12 *East.* 62. 1 *M. & S.* 679. 1 *T. R.* 466. 5 *T. R.* 26.
 2 *Ves.* 512. 6 *Peters*, 341. 4 *Day's Conn. R.* 265. 1
Harris & McHenry, 84, 868, 581. 2 *Hayw. R.* 349. 1
Yates, 28. 6 *Binney*, 59.)

So then, notwithstanding Mr. Wood run out Lot No. 8, according to the courses and distances designated in the plot accompanying the grant, and conceding that the lines, thus run, would cover the premises in dispute; still, if the testimony of Wilder and Riley be true, as to the original lines of Lot No. 2, actually run and marked by the Surveyor, as a question of law, the plaintiff was not entitled to recover, nor were the Jury bound so to find.

[19.] Again: Suppose the line sworn to, is not that which was marked by the original Surveyor; still, if it were agreed on by the coterminous proprietors, and acquiesced in, and possession to it held for eighteen or twenty years, the parties, and those claiming under them, would be bound by it, no matter when nor by whom the line was run and chopped. (*Brown vs. McKinney*, 9 *Wharton's R.* 567. *Burrell vs. Burrell*, 11 *Mass. R.* 296.)

There is a small piece of ground which stands in this predicament; it is included in Riley's fence, but outside of the old boundary line. That being so, the title to this parcel of ground will not depend on the actual line run, as proven by the witnesses, because it is not included in it; still, it is inclosed by Riley's fence. Here, then, is *possessio pedis*. If this fence has been built seven years, then this strip of land will be covered by actual occupancy; otherwise, the plaintiff's right to that will not have been lost or taken away.

Judgment reversed.

No. 21.—WILLIAM KNIGHT, administrator *de bonis non, cum testamento annexo*, of Charles Knight, plaintiff in error, vs. WILLIAM LASSETER, administrator of Solomon Lasseter.

[1.] The Act of December 27th, 1845, gives to an administrator, *de bonis non, cum testamento annexo*, obtaining his letters previous to that Act, the right to call an administrator *de bonis non*, of the deceased executor on the same estate, to an account, as to property sold by the deceased executor, and converted into cash and notes; and such Act, operating as it does, only on the remedy, though retrospective, is not unconstitutional.

[2.] The Act cannot be said to divest the legatees and creditors, of their right to call the executor, or his representative, to an account, as it gives to the administrator *de bonis non, &c.*, a right coincident with and not hostile to their interests, and intended to be exercised for their benefit and advantage.

In Equity, in Pike Superior Court. Tried before Judge STARKE, April Term, 1854.

In 1838, Chas. Knight died, leaving a will, and thereby appointing Solomon Lasseter his executor who proved the will, and was duly qualified as such executor, and took the estate into possession. In 1840, Solomon Lasseter died intestate, and Martha Lasseter was appointed administratrix on his estate. She subsequently intermarried with James A. Smith, who, by virtue of such intermarriage, reduced the whole of the estate of Charles Knight, deceased, to possession. After the intermarriage of Smith and Mrs. Lasseter, William Lasseter was appointed administrator *de bonis non*, on the estate of Solomon Lasseter, deceased.

Afterwards, to wit: on 5th day of January, 1841, William Knight was appointed, by the Court of Ordinary of Henry County, administrator *de bonis non, cum testamento annexo*, on the estate of Charles Knight, deceased, and filed his bill against William Lasseter, charging that the whole of the estate of Solomon Lasseter, including the estate of Charles Knight, went into the possession of the said William Lasseter, and calling upon him to account with and to complainant, for the estate of the said Charles Knight.

Knight, administrator, vs. Lasseter, administrator.

At the trial, Counsel for defendant "moved to dismiss the bill, upon the ground that an administrator *de bonis non*, could not call upon the former administrator, for moneys in the hands of such former administrator" Counsel for complainant having admitted that the estate of Charles Knight had been converted into cash.

The Court sustained the motion, and defendant excepted.

DOYAL, for plaintiff in error.

MOORE, for defendant in error.

By the Court.—SARNES, J. delivering the opinion.

[1.] The Act of 1845, referred to in the decision of the Court below, is as follows: "that from and after the passage of this Act, whenever any executor or administrator may have been heretofore, or may be hereafter, removed, or depart this life, chargeable to the estate which he or she represented, it shall be the duty of such removed executor or administrator, or the representatives of such deceased executor or administrator, to account, fully, with the administrator *de bonis non*, who may be appointed to finish the administration of said estate."

This phraseology is not accurate; but in the use of the words, "whenever any executor or administrator may have been *heretofore* removed," &c. it is evident that the Legislature intended, by the Act, to give a remedy to the administrator *de bonis non*, against the removed trustee, or against his representatives, if he were dead, which should have retrospective effect. It seems, in like manner, quite plain, that in the use of the words, "it shall be the duty of such removed executor or administrator, or the representatives of such deceased executor or administrator, to account, fully, with the administrator *de bonis non*", unaccompanied by words of exception or restriction, the Legislature designed to give a remedy which should be full and complete, as to all and every portion of the estate, (whether remaining *in specie*, or converted into cash and notes,) remaining in the

hands of such removed trustee, or the representatives of such trustee, deceased; and as to which the rights of other persons had not become vested.

In such a point of view, and for the purpose of operating on the remedy only, the Legislature may, undoubtedly, pass Retro-spective Acts; and for such purposes, they are not unconstitutional. (*Oglesby vs. Gilmore et al.* 5 Ga. R. 62. 1 *Kent's Com.* 459, 400. *Butler vs. Palmer*, 1 N. Y. R. 334. 3 *Smead & M.* 791.)

The decision of the Court below was placed upon the ground, that inasmuch as the proceeds of the property, sold, by the deceased executor, had been, by him, converted into cash and notes, and inasmuch as the letters *de bonis non, cum testamento annexo* of the complainant, had been granted to him before the Act of 1845, the previously acquired right of the legatees and creditors, to an account with the deceased executor or his representative, which had inured to them before the passage of the Act of 1845, could not, by it, be divested.

[2.] In the view which we take of this Act, and of this case, the right to an account, which the legatees and creditors had, was not divested, by the extension to the administrator *de bonis non*, of the same right. The right of the complainant, administrator *de bonis non*, &c. is to be exercised for their benefit, and is entirely coincident with their right. It is not a right hostile to, and in opposition to their interests. So far as any settlement has been made with these legatees and creditors, that has given to them a vested right; and with it, the Act authorizes no interference. But as to assets or funds, not turned over or paid to them, the account and settlement sought, is, in legal contemplation, for their benefit and behoof; and in giving a remedy for this, to the administrator *de bonis non, cum testamento annexo*, the Act interferes with no vested rights, and is constitutional.

Judgment reversed.

No. 22.—GEORGE T. LONG, plaintiff in error, vs. JAMES H. LEWIS, defendant.

- [1.] A declares against B, and says that it was agreed between them two, that he, A, should serve B as an overseer, for thirteen months, for \$150: but does not say that the agreement was in writing. A's evidence does not show whether the contract was in writing or not. B moves for a nonsuit, on the ground that the contract is within the Statute of Frauds: *Held*, that this motion was well over-ruled.
- [2.] A nonsuit ought to be granted, if essential allegations in the declaration are not proved.
- [3.] A new trial ought to be granted, if the verdict is contrary to the evidence.

Complaint, in Henry Superior Court. Tried before Judge STARKE, January Adjourned Term, 1854.

This was an action brought by James H. Lewis, against George T. Long, on a contract stated to have been entered into between them, December 1st, 1850, by which it was agreed that Lewis should serve Long, as overseer, for and during the space of 13 months next ensuing, and that Long should pay him therefor, the sum of One Hundred and Fifty Dollars.

The declaration stated that plaintiff had performed his part of the contract, for more than three months, and was ready to have performed the whole, but was not permitted to do so by the defendant: wherefore, he claimed the One Hundred and Fifty Dollars, as agreed upon.

The defendant filed pleas of the general issue, and that the contract was void, by the Statute of Frauds, as being a verbal contract, not to be executed within one year.

The following is the testimony introduced on either side:

FOR THE PLAINTIFF.

James J. Mitchell, by interrogatories and direct examination, swore—

1st. That he knew the parties, and the plaintiff was in the employment of the defendant, as overseer; that Lewis worked

very hard, while in the employment of defendant. He had a great deal of work done while he was in the employment of Mr. Long; thought that Mr. Lewis was a very hard-working man; frequently heard the hands working late after night and before day, while they were under Mr. Lewis.

2d. Heard defendant say that plaintiff was to live with him thirteen months for \$150. Mr. Lewis set in to oversee for Mr. Long, in December, 1850, and quit there in March, 1851. Does not know exactly how long Mr. Lewis was in the employment of Mr. Long, but thinks it was over three months; did not know the cause why plaintiff quit defendant, but heard Mr. Long say he told his negro to tell Mr. Lewis, if he was not going to do better, he might leave, and he would employ somebody else. Knows nothing more that would benefit plaintiff.

CROSS ANSWERS.

1st. Heard the plaintiff say that he went out one morning, some two hours before day, in the new ground, to mend up some brush heaps and log heaps; and after mending them up, he lay down by the fire and went to sleep.

2d. That witness heard plaintiff say he could get along with defendant, if it was not for his family.

3d. Never knew plaintiff to leave or neglect his business, while in defendant's employment; never heard any conversation between plaintiff and defendant, about plaintiff staying. Do not know whether defendant wanted plaintiff to stay with him or not. Knows nothing more that would benefit defendant.

William A Lewis sworn, says: That defendant was to give plaintiff \$150 for thirteen months' services, commencing in December, 1850, and ending in December, 1851. Plaintiff went to work with defendant; witness saw him at work there. Plaintiff quit defendant in March, 1851. In January, 1851, heard defendant say he was well pleased with plaintiff; that he was a very good hand.

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Cross-examined, says: I had this conversation with defendant, in January, 1851; saw plaintiff in defendant's employment, in the latter part of March, 1851. Witness is plaintiff's brother.

Cross-examined, says: I had this conversation with defendant, in January, 1851; saw plaintiff in defendant's employment, in the latter part of March, 1851. Witness is plaintiff's brother.

William Berry sworn, says: That plaintiff worked for defendant, from December, 1850, until towards the spring thereafter; was never in the plantation during the time, but frequently passed and saw plaintiff at work. He appeared to be getting along well; done as much work as I thought ought to have been done.

Cross-examined, says: I paid no particular attention to plaintiff's conduct. Plaintiff appeared to be controlling the hands; saw him whipping a little negro in the field.

John Johnson sworn, says: I have seen plaintiff at work for defendant, frequently, as I frequently passed; thought they were getting along well, from the amount of work I saw done, for the number of hands; thought they were doing well; don't know when he left.

Cross-examined, says: I recollect plaintiff coming one time, to where I was at work; he was going to Mr. Campbell's. I live about a mile from defendant's, and Campbell lives three miles from defendant's. It was, I think, in January, 1851; do not recollect his business: it was about the middle of the week. Plaintiff quit defendant and remained away several days, before he finally quit.

Thomas Gallman sworn, says: I saw plaintiff at work for defendant, in December, 1850. Saw him at work, one time, in the rain. I thought, from what I saw, plaintiff was doing enough of work for the number of hands. I think plaintiff commenced work with the defendant in December, 1851, and worked thirteen months. Saw him at work twice. I went to get the defendant's steers, and worked in the place of one of the hands, until he went and got the steers for me. I thought

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plaintiff was getting along well with his work. In a conversation with the defendant, he told me he had told one of the negroes to tell plaintiff, if he did not do better he might leave. He said plaintiff had left, and we were talking about his leaving, the way the conversation commenced. He said plaintiff had gone to sleep in the new ground.

Christian Lewis sworn, says: Plaintiff and myself, after plaintiff had left defendant, went to defendant and told him he still wished to live with him; defendant made no answer. This was two or three days after plaintiff left defendant. Plaintiff offered to leave it to men, and defendant said he would do right about it. I do not remember any thing further that was said.

Cross-examined, says: Plaintiff had only been at my house two or three days, before I went back with him. Saw another white man at work with defendant's negroes, when we went back. Plaintiff and myself went back to know whether defendant had employed him another overseer. I am not positive to the time we went back. Plaintiff closed.

The testimony of plaintiff being closed, defendant moved to nonsuit plaintiff—

1st. Because the contract proven in said case was void, it being a contract not to be executed in a year from the making of it.

2d. Because plaintiff's testimony proved that he left the employment of defendant, without any cause, at his own option and will.

Which motion was over-ruled on both grounds, and defendant's Counsel excepted.

The Court ordered the case to proceed, and the defendant introduced the following evidence, to-wit:

TESTIMONY OF DEFENDANT.

Martha M. Roundtree, by interrogatories on direct examination, swore: That plaintiff was in the employment of defendant, as overseer. He set in about 1st December, 1850, and

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was in defendant's employment until about 19th or 20th March, 1851. He left about the time above mentioned. I heard the plaintiff tell defendant he wished to be off, and that defendant might look him out another overseer. The defendant asked his reasons for wishing to leave. Plaintiff said he could not please his family. Defendant said he did not employ him to please his family, but to attend to his business. Defendant asked him what was the matter—he said that defendant's daughter, Mulissa C. Long, had complained of his work that day. Defendant told him again, that he did not employ him to please his family, but to attend to his business: and if he would make him sure of his services, he would give his notes and as good security as there was in the district. Plaintiff answered, "You may look out another man to attend to your business". Defendant told him to bring him another man to attend to his business, for defendant said he knew of none worth employing, for the time had passed; all men engaged in that business, worth having, were employed. Plaintiff said he was going to leave any how, and he would leave it to any two men what the time was worth that he had served. Defendant told him he had not employed any two men to make his contract, nor would he employ any two men to break it. Defendant urged him to stay and carry out his contract. Plaintiff refused to do so. This conversation took place on the 19th of March, 1851.

To cross-interrogatories, she answers: She has fully and particularly stated the whole of the conversation referred to in the answers to the second direct interrogatory. Defendant did not get angry—he spoke in a mild manner throughout the conversation, and persuaded plaintiff to stay his time out, for which he had set in. Did not hear defendant tell plaintiff that his wife had told him any thing about that day's work. Witness has answered, in the second direct interrogatory, all she knows about its being left to neighbors. Did not hear defendant tell plaintiff, if he did not do better, he might leave his employment. Did not hear defendant rave or swear. Defendant did not say he would not pay him any thing for his

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work; but that he had not called upon his neighbors to make his contract—neither would he call upon them to break it. Did not hear defendant say that plaintiff should not stay after he had cleared his new ground, or Fayetteville Court. Heard defendant say, that if plaintiff left, he could not get in his new ground, and that it would injure him over two hundred dollars. Did not hear defendant say any thing about plaintiff having to leave. Did not hear plaintiff express a desire to stay all the year. Did not hear the defendant say any thing about needing the plaintiff after Fayetteville Court, or that he should then leave. Witness was frequently at defendant's, at meal-time. Plaintiff was treated as one of the family. Did not hear plaintiff say any thing about the family mistreating him, in order to drive him off. Witness is the daughter of the defendant—knows nothing of any mistreatment from the defendant and family, to run the plaintiff off.

Knows nothing more.

William Russell sworn, says: Plaintiff told me he had no objection to living with defendant; that defendant treated him well, and did not interrupt him in his work. This he told me before he left defendant's, and afterwards. He also said he had come back to defendant's, to live with him, and repeated, that he had nothing against Mr. Long. He said he could live with Mr. Long, in peace and quietness, forever. This last conversation was after he left defendant's. Plaintiff had left him once before, and went back.

Cross-examined: Had the second conversation with plaintiff, near my house, in the road, close to my gate.

Alfred Stegar sworn, says: Plaintiff said, after he had quit the business of the defendant, that defendant did not want him to leave; that Mr. Long had treated him well—but he had left the defendant's. This he repeated several times.

Cross-examined, says: This conversation was in April, 1851. He said the reason he left, he could not get along with some of the family. He said the old lady complained of him for getting up before day, and waking up the negroes before day,

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and going to work before day. This conversation I had with plaintiff, was after he quit entirely.

William M. Long sworn, says: I am defendant's son, and acted as his agent in employing plaintiff. The contract was: The defendant was to give the plaintiff \$150, for 13 month's services; and if he did not serve his time out, he was not to have any thing. I made the contract, under instructions from the defendant. Defendant has five hands under plaintiff; the hands, besides building a chimney, were chiefly employed in clearing land—30 or 35 acres cleared, but not fenced. Plaintiff left the 19th or 20th of March, 1851. Heard the old man Christian Lewis testify. In January, 1852, he and his son come back and offered to leave it to men, to settle between plaintiff and defendant. Defendant refused to settle, by giving his note; thinks this was the time referred to by said Christian Lewis, in his testimony.

David Kuglar sworn, says: Defendant and myself made a contract for my son to oversee for him, on the 24th March, 1851, until Christmas; and my son set in and overseed for defendant, until November of that year, and then quit by consent of defendant, to go to school. There never was any difficulty between defendant and witness' son—they got along well together.

Wm. Reid sworn, says: Had a conversation with plaintiff about his leaving defendant—plaintiff said defendant did not want him to quit, but he did quit.

Cross-examined, says: plaintiff said he could not stand defendant's family, that they mistreated him. He said Mrs. Long threw a shoe at him, and complained of him. He said defendant had sent a negro to tell him if he did not do better, he might quit. This conversation was after plaintiff had left defendant's. Plaintiff said he and defendant could get along well together.

The testimony having closed, defendant's Counsel asked the Court to charge the Jury, "that if the plaintiff and defendant mutually agreed to rescind the contract between them, that the plaintiff, in this form of action in said case, could not reco-

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ver"—which the Court declined doing—to which refusal to charge, defendant's Counsel excepted.

The Court charged the Jury, as follows:

If plaintiff and defendant entered into a contract, in which plaintiff undertook to oversee for the defendant thirteen months, and in consideration thereof defendant was to pay him \$150, and if the plaintiff, pursuant to the agreement, entered into the service of the defendant, and faithfully performed the contract on his part, for several months, and was, while so engaged in the faithful execution of the contract, dismissed and discharged from the employment of the defendant, without just cause, and was, thereby, hindered from the completion of the service agreed on; then if you find, from the evidence, such a state of the facts as this, you will render a verdict for the plaintiff, for the full amount agreed on by the parties, for the 13 months' service.

But if you find the contract as above, and if you find, from the evidence, that the plaintiff voluntarily, without the assent of the defendant, abandoned the contract, and left his service without just cause, before the completion of the term of service agreed on, then the plaintiff is entitled to recover nothing.

I have been requested by defendant's Counsel, to charge you, "that if plaintiff and defendant mutually agreed to rescind the contract, that the plaintiff, in this form of action, cannot recover." I must decline so to instruct you: but if, when the plaintiff left the service of the defendant, the parties mutually agreed to rescind the contract, then you will find for the plaintiff rateably, according to the time he actually served. If the parties agreed to separate, then it is but right the overseer should be paid for the time he actually served, at the rate he agreed on.

The Jury found for the plaintiff One Hundred and Fifty Dollars, and costs of suit.

Whereupon, the defendant moved for a new trial, on the following grounds:

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1st. Because the Jury found contrary to evidence, and without evidence.

2d. Because the Jury found contrary to the charge of the Court.

3d. Because the Court erred in not deciding that the contract proven in said case, was void, it being a contract in parol, and not to be executed in a year from the making of it.

4th. Because the Court erred in refusing to charge the Jury, that if the parties, to wit: plaintiff and defendant, mutually agreed to rescind the contract between them, that the plaintiff, in the form of action before the Court, could not recover.

5th. Because the Court erred in not ordering a *non-suit*, when moved by defendant's Counsel, after the testimony of plaintiff had closed.

Which motion was over-ruled by the Court.

Counsel for defendant excepted, and allege as error the various rulings of the Court, as excepted to.

MCCUNE; STELL for plaintiff in error.

BOYAL; SPEER, for defendants.

By the Court.—BENNING, J. delivering the opinion.

The motion for a non-suit in this case, was put on two grounds: First, that the contract sued on, was one which was not "to be executed within a year from the making of it", and yet was not in writing. Second. That "the plaintiff's testimony proved that he left the employment of defendant without any cause, and at his own option and will."

[1.] As to the first ground, it is sufficient to say, that it does not appear, from the declaration, or the proof, that the contract was not in writing. The contract may have been in writing. And as an illegal act is not to be presumed, it is not to be presumed that the contract was not in writing. (2 *Saund. Pl. and Pr.* 126.)

This ground, therefore, was not sufficient to support the motion.

As to the second ground:

The only "cause" which the defendant in error, by his proof, showed for failing to perform his part of the contract, was this saying of the plaintiff in error, in conversation with the witness Gallman: "In a conversation with the defendant, he told me he had told one of the negroes to tell plaintiff if he did not do better, he might leave." The witness added, "He said plaintiff had left, and we were talking about his leaving, the way the conversation commenced. He said plaintiff had gone to sleep in the new ground." This is all the cause. And this is not enough.

First. It does not appear that the negro ever delivered the message. Second. The message, if delivered, imported a permission—not a command—a permission to leave, if he, the overseer wished to leave—in other words, imported a willingness on the part of the employer, to cancel the agreement. Third. But a willingness to cancel it, only on condition—on the condition that the overseer "did not do better." The employer having reference, doubtless, to the overseer's having "gone to sleep", and in the new ground. If the overseer was willing to do better than going "to sleep" in the new ground showed him to be doing, the employer was willing for him to stay; and in that case, the employer did not offer the overseer the option of a rescission.

This evidence did not make out the allegations of the overseer in his declarations—the essential allegations that he was ready to perform his part of the contract, but was not permitted to perform it by the employer. On the contrary, it disproves those allegations. It shows that the overseer left his employer in such a way, as at the very least, to deprive himself of all claim on the employer for any pay, except for the time he had stayed with the employer. But his suit was for pay for the whole time—was for the full amount agreed to be paid him for the service to be rendered for thirteen months.

[2.] This being so, the second ground of the motion for a non-suit was good, and the non-suit on it should have been granted.

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Was the verdict contrary to the evidence? This was one of the grounds of the motion for a new trial.

[8.] We think it was. Weak as was the case of the plaintiff below, as made by his evidence, it was rendered still weaker, if that were possible, by the evidence of the defendant.

According to the evidence of the defendant, the defendant "did not want him (the plaintiff) to quit, but he did quit;" and according to that evidence, the defendant "treated him well." According to that evidence, his reason for leaving his employer was, that "he could not get along with some of the family." But that evidence shows nothing in the conduct of any of the family, sufficient to prevent him from performing his part of the contract.

As to the ground with respect to the Statute of Frauds, the same may be said of it that was said of the same ground in the motion for a non-suit. There is nothing in the evidence to show that the contract was not in writing.

No. 23.—GREEN, TRACY & Co. plaintiffs in error, vs. BRYAN INGRAM *et al.*, defendants.

[1.] The allegations of a bill, which state that a firm, "or some of the members composing said firm," had obtained control of certain *f. fas.* and done certain acts complained of, are too loose and uncertain. So is the alternative allegation, that "some of the firm had obtained control of said *f. fas.* by purchase or otherwise." So, too, the averment, that said firm bought "the same, either for R, or after his death." For a similar reason, the statement is inaccurate, that "to some of these *f. fas.* and judgments, the defendants have not procured formal assignments." In like manner, the allegation, that "most of the *f. fas.* and judgments, so bought and controlled, are against said R, jointly with others," &c. is very loose, as not admitting of a practical issue.

[2.] Where G T & Co. made a bona fide purchase of property, against which there are judgment liens, and before or afterwards, purchased or got, con-

trol of those judgments, and subsequently caused them to be levied on other property of the defendant in *f. fa.* and the same was sold and brought into Court by the Sheriff, and claimed by younger judgment creditors: *Held*; that at the instance of these younger judgment creditors, a Court of Equity cannot properly compel G T & Co. to satisfy their older *f. fa.* out of the said property, purchased by them.

[3.] Where property, subject to such older judgments, belonged to a firm of which the defendant in *f. fa.* was a member, was liable to pay the debts of said firm, and was also claimed as the private property of the survivor of said firm: *Held*, that the survivor is in the position of one who has a fund in his hands, on which there are two liens or claims, and that in Equity, he would have the right to insist, that these older *f. fa.* should be turned upon a fund in Court, the individual property of the defendant in *f. fa.*: *Held*, also, that if on such fund there was the lien of younger judgment creditors, then, inasmuch as both the surviving partner and these younger judgment creditors, sustained to it the relation of innocent claimants, with equal equities, a Court of Chancery could not properly interfere between them.

[4.] An allegation, that such older judgment creditors have not only laid by and neglected to enforce their rights; but have allowed money, to a large extent, to be raised from the defendant in *f. fa.* by younger judgment creditors, where there is no charge of fraud or collusion, or advantage gained by the older plaintiffs in *f. fa.* amounts to a charge of simple negligence, and a Court of Chancery cannot treat such negligence as a satisfaction of the debt.

In Equity, in Bibb Superior Court. Decided by Judge POWERS, January Term, 1854.

This was a bill filed by Brown and Dimick, merchants in N. York, against Green, Tracy & Co. of Macon, setting forth, in substance, the following facts, viz: that at November Term, 1852, complainants obtained judgment against Samuel J. Ray, for \$3078 86, with \$661 62 interest, up to the 14th November, 1852, upon which execution issued.

That the said Ray died on the 11th January, 1853, and that soon thereafter, Counsel of complainants delivered said *f. fa.* to the Sheriff of Bibb County, with instructions to levy the same on all Ray's property—his negroes, and one half interest in the Georgia Telegraph, including types, &c. &c. But that said levy was not made until 28th March, 1853, when the said half interest was claimed by said defendants, who bought said

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half interest (*if at all*) after the death of said Ray, from his former partner in the printing business, Thomas L. Ross, and after said notice to levy on the same, and with knowledge of said instructions. That said claim is still pending and undisposed of in said Court.

That said firm of Green, Tracy & Co. or some of the members composing said firm, having obtained control, by purchase or otherwise, of a number of the oldest *fi. fas.* against said Ray, (naming them) caused the same to be levied on the said negroes of said Ray, which had been pointed out as aforesaid, by the Counsel of your orators, and which negroes were on the _____ day of _____ 1853, sold by the Sheriff, under the levies so made of the *fi. fas.* controlled by Green, Tracy & Co. the proceeds of which sale, viz: \$1808 90 is now impounded by order of Court, for distribution. That at May Term, 1853, of said Court, Counsel for complainants moved said Court to order said fund to be paid to complainants' *fi. fa.* which was opposed by Green, Tracy & Co., thus claiming the same on their older *fi. fas.* as they had a superior lien. Complainants charge that this would be unjust, for the following reasons:

1. Because the said oldest *fi. fas.* are of dates prior to the partnership of said Ray and Ross—prior to which partnership the said Georgia Telegraph was the sole property of said Ray, and as such, subject to the lien of the *fi. fas.* so controlled by Green, Tracy & Co.; and of sufficient value to pay off said *fi. fas.*—whereas the *fi. fa.* of complainant has been obtained since said partnership and the said Georgia Telegraph was the joint property of Ray & Ross—and said firm is much indebted—and that said partnership property is not liable to be sold for the individual debts of said Ray, until the debts of Ray & Ross are paid.

2. That Green, Tracy & Co. not only have a lien on two funds, and complainants only on one (to wit: the fund in Court) and not on the Georgia Telegraph: but that Green, Tracy & Co. have received and are now in possession of said Georgia Telegraph, which is sufficient to satisfy their claims—that this is,

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in Equity and Law, a satisfaction of their claims—and that the judgments should be satisfied in full.

That Ray died insolvent, and with full knowledge of this insolvency, said Green, Tracy & Co. or some of said firm, bought up a part of said *f. fas.* and complainants ask a discovery of which, and that to some of said *f. fas.* they may not have formal transfers.

That most of the *f. fas.* so bought up, are against said Ray, jointly, with others; and that the fund in Court, was raised from the individual property of said Ray; and that it would be inequitable for them to receive any part of the fund, in Court, or more than they paid for said *f. fas.*, for complainants believe that Green, Tracy & Co., bought the same, either for Ray or after his death, with full knowledge of the insolvency of Ray's estate, and the rights and liens of his other creditors.

Complainants say, that on some of the *f. fas.* payments have been made, which are not credited on them; and that they may be required to discover the payments, and to whom, and amounts, and that they may be credited. Complainants believe that if the said *f. fas.* had been pressed, heretofore, they could have been collected. But that the plaintiffs therein have laid by and neglected to do so, and have allowed large amounts of money, raised from said Ray's property, to be applied to junior liens and *f. fas.*; and that so far as complainants are concerned, this amounts to a satisfaction of the *f. fas.* of Green, Tracy & Co. or a satisfaction, *pro tanto*.

The bill prayed that defendants be enjoined from pursuing the fund, and that their *f. fas.* be satisfied.

PER, MILLER & HALL, for plaintiff in error.

WHITTLE & RUTHERFORD, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] The structure of this bill is very objectionable. Most

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of its allegations are inaccurate, loose and uncertain; and this is shown as follows:

1. It is alleged that "said firm of Green, Tracy & Co. or some of the members composing said firm", had obtained control of a number of the oldest *fi. fas.* and judgments against said Ray. This alternative statement must have reference, both to the firm and to individual members thereof; no other reasonable signification can be given to the words, *or some of the members composing said firm*; for if it had been intended to allege, that *some of the members*, in this behalf, acted for the firm and not for themselves, then there would have been no necessity to have made the statement in the alternative—as the acts of those members would have been the acts of the firm. The allegation is therefore defective. We learn from elementary works on this subject, that "if two plaintiffs sue, and the bill allege that the title was in one or other of them, in the alternative, it would be demurrable, not only for uncertainty, but, because it shows that there must, necessarily, be a misjoinder of the plaintiffs". So where two defendants are sued in the alternative, for a precisely similar reason, the pleading must be bad. (1 *Story Eq.* § 510.)

2. The bill goes on to allege that said firm of Green, Tracy & Co. or some of them, had obtained control of said *fi. fas.* "either by purchase, or otherwise". Insinuating, by another alternative statement that these *fi. fas.* might have been obtained by covinous arrangement. This loose and uncertain allegation, is also objectionable.

In the case of *Cresset vs. Milton* (1 *Ves. Jr.* 449; 3 *Bro. C. C.* 480) a bill had been filed to perpetuate testimony to a right of common, and of way; and it stated that "the tenants, owners, and occupiers of the lands, and in right thereof or otherwise, have, from time immemorial, had the right of way," &c. Upon demurrer, Lord *Thurlow* said, "you have not stated whether the right of way is appurtenant or appendant to the land, &c. that you hold; and you state it loosely, that you have such as belongs to your state or otherwise; so that your bill is to have a commission to try any right of common whatever". To like pur-

part, see judgment of Lord Keeper North, in *Gell vs. Hayward*, 1 Ver. 812.

8. For a similar reason is the statement objectionable, that complainants believe defendants "bought the same, *either for Ray, or after his death*, with a full knowledge of his insolvency," &c.

4. The bill also states, that "it may be that to some of said *fi. fas. and judgments*, they, the defendants, have not procured formal assignments and transfers," &c. And also, "*on some of the fi. fas. and judgments*, so bought and controlled by said Green, Tracy & Co. there have been payments made, which are not credited"; and they pray that the defendants may be compelled to disclose the payments, &c.

These, too, are inaccurate and uncertain averments, and objectionable on similar principles to those above stated.

In *Ryves vs. Ryves*, (3 Ves. 343,) where a bill was filed for a discovery of title deeds, and for the delivery of the possession of the lands to plaintiffs, &c. "upon a loose allegation, that under *some* deeds in the custody of the defendants, the plaintiff was entitled to *some* interest, in *some* estates in their possession, but without stating what the deeds were, or what the property was to which they applied, a demurrer was allowed".

5. Again—we find the allegation, "that *most of the fi. fas. and judgments*, so bought and controlled, are against said Ray, jointly, with others," &c. Touching a similar allegation in the bill, which was filed in the case of *McGehee et al. vs. Jones*, (10 Ga. 137,) this Court has said, that "no practical issue could be formed on it. He does not aver that the executor has no assets to pay the damages: he says, he has not in hand, sufficient for that purpose; and adds, that most of the assets have been paid out or distributed. There is no certainty in this averment".

[2.] But, if we take such statements as do appear in this bill, as the complainants' case, without objection for uncertainty, we strongly incline to think that the prayer cannot be granted.

According to such showing, what is their equity, as to the interest in the properties of the Telegraph Office (which was one half of said properties,) purchased by defendants?

The bill shows, that the purchase which they made of this property, was a *bona fide* purchase. It makes known the fact, that their *fi. fas.* were the oldest against this property, and that it was liable to these, and to the firm debts of Ray & Ross, which may have existed at the time of its purchase. It, perhaps, shows that they had used diligence and consulted thrift, getting control of the superior liens against the property; and then having control of these liens, purchased the property. If this were a *bona fide* purchase, however, and Green, Tracy & Co., have paid a consideration to Ray & Ross, or the estate of Ray, for the same, how can a Court of Equity compel the former, for the gratuitous benefit of others, now to lose a benefit, fairly gained by them in the due course of trade, by forcing them, as it were, to satisfy their own executions out of their own property?

It would seem that the very statement of the simple question, should be sufficient to constitute its own answer.

The maxim, "*Sic utere tuo ut alienum non laedas*" was invoked by the Counsel for the complainants, as opposed to the use which these defendants were making of their rights, as judgment creditors, here. We do not understand how this maxim can be made applicable to such a case, and we think it cannot be made applicable unless, possibly, where there was a distinct and accurate averment that these older *fi. fas.* had been purchased at a discount. In such case, perhaps, if the fact were distinctly set forth, a Court of Equity would not permit the legal title of the complainants, to the whole of the executions, to be used, as against the fund in Court, to the injury of the younger judgment creditors.

We may also add, here, that if there were a distinct allegation in the bill, to this effect, and the prayer was not that these older *fi. fas.* be enjoined, and be entered satisfied, but that in consideration of this fact, they be allowed to recover only *pro tanto*, this would present a different case—such a case as was

referred to in the books cited by the Counsel for the complainants.

As the case is presented, it is a simple question of right, between two sets of judgment creditors, to a given fund. One set, only, of them can have the right. If Green, Tracy & Co. have that right, the complainants cannot have it. If the former have the right, they are entitled to the fund. And to insist, that if they are thus allowed to get the fund, they will be doing wrong, and injuring others, is, as it impresses us, like insisting, *that by doing what is right, they will be doing what is wrong.*

[3.] What, in the next place, is the equity presented by the bill, as to the half interest in this printing office, retained by Ross? The bill alleges that this, his interest, is subject to these older *fi. fas.* owned by the defendants; and it has been insisted, that the defendants should be compelled to have the same subjected to the payment of their executions. Now, according to the bill, this interest is subject to these older *fi. fas.*—subject to the debts of the partnership of Ray & Ross, and is the private property of Ross. Thus, the latter is shown to be in the position of one with a fund in his hands, on which there are two liens or claims; and certainly, if the first of these, (as stated above) were being pressed against the property, he would have the right to insist, that in Equity, the plaintiffs in *fi. fa.* should be turned away, and compelled to go against a fund of Ray, which was his individual property—which is the character of the fund raised by the sale of these slaves.

If the reply be, that on this latter fund, too, there is another lien, viz: the lien of these complainants' judgments, the answer is, that this only shows, that these complainants, as well as Ross, as to this fund, are in the attitude of innocent claimants, with equal equities; and between such, a Court of Chancery will not interfere.

We may add, here, that if Ross' interest could be, by this bill, subjected to the payment of these *fi. fas.* he would be a necessary party to the bill.

[4.] As to the allegation, that the defendants, as plaintiffs

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in these older *fi. fas.* "have not only laid by and neglected to enforce their rights, and the collection of their money, but have allowed money, to a large amount, raised from said Ray, by the Sheriff, either by sales or otherwise, to be applied to the payment of junior liens" &c.; it is the opinion of this Court, that the same presents no equity. There is no charge of fraud or collusion, or advantage gained by this conduct—nothing more than simple negligence; by which, so far as this statement shows, no one but the complainants, themselves, suffered. We know of no rule of Law or Equity, which will make this a satisfaction of the debt.

Judgment reversed.

No. 24.—THE MAYOR AND COUNCIL OF MACON, plaintiffs in error, vs. HARVEY W. SHAW, defendant.

- [1.] The Mayor and City Council of Macon, in accusing, trying and dismissing their Marshal, under and by authority of their charter and ordinances, upon a charge of malpractice in office, or neglect of duty, by gambling in said city, were acting in the character of a Judiciary, in the sense in which that term is used in the Constitution of our State; and the writ of *certiorari* to the Superior Court, lies in such a case.
- [2.] Our Judiciary Act of 1799 refers only to the writ of *certiorari*, as issuing to the Inferior Court *proper*, (meaning our County Court, composed of five Justices,) and the 20 day's notice, by that Act required to be given, has application to such Court only.
- [3.] The crime of gambling in the City of Macon, by the Marshal, does not constitute such malpractice in office, or neglect of duty, as was contemplated by the 3d section of the amendment to the Charter, passed February 22d, 1850.

Certiorari, in Bibb Superior Court. Decided by Judge Powers, May Term, 1854.

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BILL OF EXCEPTIONS.

GEORGIA—BIBB COUNTY:

Be it remembered, that on the fifth day of June, 1854, during the regular term of the Superior Court of said county, His Honor, ABNER P. POWERS, one of the Judges of the Superior Courts of said State presiding:

The petition for *certiorari*, of Harvey W. Shaw vs. The Mayor and Council of the City of Macon, came on to be heard; and Counsel for both parties having announced themselves ready, argument was had upon the said petition for *certiorari* and statement of facts, as agreed upon by Counsel, as follows, to-wit:

STATE OF GEORGIA—BIBB COUNTY:

To His Honor, Abner P. Powers, one of the Judges of the Superior Courts:

The petition of Harvey W. Shaw sheweth, that heretofore, to-wit: on the third day of June, in the year 1853, at a regular meeting of the Honorable the Mayor and Council of the City of Macon, held at the Council Chamber in said city, the following Preamble and Resolutions were agreed and passed by said body, to-wit:

WHEREAS, It has been represented to the Mayor and Council that indictments have been returned by the Grand Jury, at the last term of Bibb Superior Court, against Harvey W. Shaw, Chief Marshal, and Henry J. Cooper, Deputy Marshal of the city, for gambling; and, whereas, Council have reason to believe that said offence, if committed, was committed within the corporate limits of the city:

Resolved, That Council will proceed, at the next regular meeting of the Council Chamber, to-wit: on Friday next, the 10th of June, 1853, at four o'clock in the afternoon, to investigate the said charges, and to put said Harvey W. Shaw and said Henry J. Cooper, on their trial for the same.

Resolved, That the Mayor is requested to have the proper

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notices served upon said Harvey W. Shaw and said Henry J. Cooper, requiring each of them to appear, then and there, to answer said charge.

Resolved, That the Mayor is requested to have the witnesses who appeared before the Grand Jury subpoenaed, to be in attendance at said time and place.

And petitioner further sheweth, that in pursuance of said resolution, your petitioner, on the 7th day of said month, was served with a notice, of which the following is a copy :

GEORGIA—BIBB COUNTY :

City of Macon to Harvey W. Shaw, Marshal :

You are hereby required, personally, to be and appear at the Council Chamber in said city, at 4 o'clock P. M. on Friday next, to answer to charges preferred against you.

A. R. FREEMAN, c.c.

June 7th, 1853.

And petitioner further sheweth, that afterwards, to-wit : on the 10th day of said month, petitioner appeared, in obedience to said summons and notice, at the time and place therein mentioned, before the said Council then in session ; when, on motion of Alderman Holt, a member of Council, the regular business was suspended until the investigation of the charges against the Chief Marshal was disposed of.

And on motion, it was agreed by Council that Messrs. Poe, Nisbet & Poe, as Counsel for said corporation, and Messrs. Lanier & Anderson, Robert A. Smith, Hall & Carey, and Stubbs & Hill, as Counsel for said Harvey W. Shaw, be permitted to occupy seats within the bar, to conduct the prosecution and defense of said case.

Whereupon, the said Shaw was asked if he was ready to answer the charges preferred against him, when petitioner, by his Counsel, answered ready. The prosecution announced ready, and was proceeding to swear and examine certain witnesses hereinafter mentioned, when Counsel for defendant,

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your petitioner, objected to any evidence being given to prove the charge preferred, on the ground that the said Mayor and Council had no jurisdiction to try your petitioner for gambling; that such offences were cognizable and triable, alone, in the Superior Courts of the State.

Counsel for the prosecution then verbally announced that it was not proposed to try defendant, your petitioner, for an offence against the State laws, but for a violation, by gambling, (he being the Chief Marshal of the city,) of the charter and ordinances of the City of Macon; and consequently, for malpractice in office and neglect of duty.

At this stage of the trial, for the purpose of discussing said question, whether gambling within the corporate limits of the City of Macon, by the Chief Marshal of the said city, during his term of office, amounted to malpractice in office, and neglect of duty, under the charter and ordinances of said city, defendant, by his Counsel, for the sake of the argument, admitted the fact of gambling within the city limits, during his term of office as Chief Marshal; and after argument had, it was decided and adjudged that gambling by the Chief Marshal of the city, within the corporate limits of said city, during his term of office, did amount to malpractice in office, and neglect of duty.

Counsel for defendant then objected to be tried upon the charges thus preferred, upon the following grounds:

1st. Because defendant was elected by the people, and not by the City Council: he ought, therefore, to be tried in solemn form, and not dealt with summarily; that he had no notice of the charges thus preferred, and therefore, no opportunity of defence; and the said charges were wholly different to the charge to which he had announced himself ready to answer, as set forth in the resolution specifying charges; and that he was not charged or notified in writing, then or previously, that he would be put on his trial for malpractice in office, or neglect of duty.

2d. Because he had no notice of any distinct offence or offences of gaming; nor was he called on to answer the charge

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of any distinct case or cases—when and where done, or what game or games played, but to answer the charge of gaming generally.

3d. Because gambling by the Marshal, within the city limits, is not, in any sense, a violation of the city charter or ordinances, but a violation of the Penal Code, and cognizable and triable alone in and by the Superior Court.

4th. Because gambling by the Marshal, within the city limits, is neither, in any sense, malpractice in office nor neglect of duty, according to the charter and ordinances.

5th. Because there is nothing contained in the charter, nor in the ordinances, nor have instructions, of any kind, ever been given to said Shaw, upon assuming the duties of his office or since, notifying him that he would be held amenable to Council, in any shape, for gambling.

6th. Because, under the city charter and ordinances, the Marshal, being elected by the people, can only be tried or dismissed by the Council, on the grounds, viz: malpractice in office or neglect of duty—and that gambling is neither the one nor the other.

All which objections, the Mayor and Council over-ruled, and proceeded with the trial.

Counsel for the prosecution swore the following named witnesses, to-wit: John Chain, Eliphalet E. Brown and Victor Menard, and proposed to introduce the said John Chain and Eliphalet E. Brown, who had not been before the Grand Jury as a witness against said Shaw or Cooper. Counsel for defendant objected, on the grounds that the resolution of Council, calling upon said Shaw to answer the charge of gambling, having provided that certain witnesses, who had testified before the Grand Jury, should be subpoenaed to appear before the Council to testify against Shaw; and no provision having been made for the subpoena of other witnesses, said Shaw had a right to expect that no other would be produced; and the same tended to entrap him and embarrass his defence.

The objection to the witnesses was over-ruled, and the fol-

lowing is the testimony—and the only testimony, of any kind—introduced by the prosecution :

Victor Menard, John Chain and Eliphalet E. Brown, being duly sworn, all testified that they saw Harvey W. Shaw, the principal Marshal of the City of Macon, gambling for money on the Sabbath, being the Sabbath before the May Term of Bibb Superior Court, 1853, within the corporate limits of the City of Macon, and during his present term of office as principal Marshal.

After closing the testimony, Counsel for the defendant then moved his discharge, on the following grounds :

1st. Because no malpractice in office, and no neglect of duty, had been proven.

2d. Because no notice to the Marshal, on the part of the the Mayor or any member of the Council; although they knew of such offence within the limits of the city, to prosecute for the offence of gambling, has been or could be proven to have been given ; and because such notice is necessary, under the ordinances, before the Marshal is liable for the neglect of duty.

The question was then put, whether Harvey W. Shaw, principal Marshal of the City of Macon, had been guilty of the offence of gambling, within the corporate limits of the City of Macon, during his term of office—which was unanimously decided in the affirmative.

It having been decided as above stated, that gambling, within the corporate limits, by the principal Marshal; amounted to malpractice in office and neglect of duty, under the city charter and ordinances, the Council retired to deliberate what action they should take in the premises. Whilst discussing the questions made, a resolution was moved and agreed to by said Mayor and Council, restricting all debate, on the part of Counsel for the prosecution and defence, to one speech on each side, on any single point that might be made, or might arise, in the

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subsequent stages of the said trial ; to which, Counsel for defendant excepted, on the ground that the same crippled the defendant's defence.

The Mayor and Council then retired in secret council, with closed doors, in the room of the Clerk of Council, and after remaining out for the space of one half hour, returned to the Council Chamber—when his Honor then read the following resolution, (the same resolution having been prepared by said Mayor and Aldermen, in said secret council, and then publicly agreed to and passed, to-wit :) having first allowed said Shaw's Counsel, private perusal of said order, and opportunity to show cause, if any they have, why said order should not be made the order of Council, and publicly passed ; and after said showing, on the part of Shaw, said order was publicly admitted to Council for their action, and unanimously adopted, as their order and decree, in said case :

Resolved, That in the opinion of the Mayor and Council of the City of Macon, the Marshal, Harvey W. Shaw, in this city, in being guilty of the offence of gambling within the corporate limits of said city, has been guilty of malpractice in office and neglect of duty ; and it is considered and adjudged, by the Mayor and Council of the City of Macon, that Harvey W. Shaw is hereby dismissed from the office of Marshal of the City of Macon.

To all which proceedings your petitioner objected.

And your petitioner further shows, that at the next regular meeting of the said City Council, to wit : on the 17th day of June aforesaid, your petitioner, by his legal Counsel, before the minutes of the said last meeting were confirmed, moved said Mayor and Council to reconsider their said proceedings against your petitioner ; and in support of the same, presented the following petition, signed by your petitioner ; and also another, in support thereof, signed by two hundred and seventy citizens, who constitute a majority of all the voters of said city, under the charter and ordinances thereof, to-wit :

To the Mayor and Council of the City of Macon :

The petition of Harvy W. Shaw, late Marshal of the said city, respectfully sheweth :

That your Honorable Body, having at the last meeting of Council, passed a resolution dismissing your petitioner from the office of Marshal, for reasons therein contained, as a last resort, and with the hope that the action of your body might be reconsidered before the minutes of the last meeting are confirmed, he has referred his case to the citizens individually ; and prays that the memorial he now presents, signed by a majority of all the voters of the city, may be examined and acceded to, and that on account of the defendant's condition ; of petitioner's family ; on account of the wishes of a majority of the citizens as aforesaid, under their own hands in said memorial ; and on account of the fact that your late action would throw him out of business, at a time when he could not expect other means of support for the balance of the year, he prays that your Honorable Body would reinstate him in office for the balance of the term for which he was elected. On his part, he promises faithfully, and to the best of his power, to discharge the duties of Marshal ; to demean himself, in all respects, in such manner as the Marshal is expected to do ; that he will not gamble, himself, nor give any aid or countenance to it in other persons ; and that he will faithfully prosecute all offences which may come to his knowledge, under such directions as Council may give him, or the ordinances require him to do.

All this he is prepared to bind himself in a bond, with good security, to do and perform. And your petitioner will ever pray, &c.

HARVEY W. SHAW.

June 17th, 1853.

STATE OF GEORGIA, BIBB COUNTY—*City of Macon :*

We, the undersigned, citizens of Macon, petition the Honor-

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able the Mayor and Council of the City of Macon, to reinstate Harvey W. Shaw, the late Marshal, in his office for the balance of the term for which he was elected, he giving good bond and other assurances to Council, that he will not participate in, or give countenance to gambling, in any shape or form, during the balance of his term.

Signed by the citizens aforesaid.

June 15th, 1853.

(The original petition and signatures are thereto attached, as a part thereof.)

On hearing which memorials, Council proceeded to confirm and did confirm, their proceedings in the premises, by which your petitioner was dismissed from his said office as Marshal and a new election was therefore ordered, the said Council having before confirming said minutes, permitted said defendant's Counsel to file his bill of exceptions to the action of Council in the premises.

Whereupon, your petitioner, by his Counsel, filed the following Bill of Exceptions, protesting against the action of said Council in the premises, which were over-ruled by said Council.

(For first six grounds see page 4.)

7th. Because the resolution of Council, calling upon said Shaw to answer the charge of gambling, having provided that certain witnesses, who had testified before the Grand Jury, should be subpoenaed to appear before Council, to testify against said Shaw, and no provision having been made for the subpoena or introduction of other witnesses, said Shaw having the right to expect, and did expect, that no other witnesses would be produced against him; and that Council had, in admitting such other witnesses as the same, tended to entrap defendant and embarrass his defence.

8th. Because no malpractice, nor any neglect of official duty had been charged or proved.

9th. Because no notice to the Marshal, on the part of the Mayor or any member of Council, although they knew of the existence of such offences within the city limits, to prosecute

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for the offences of gambling, has been or could be proven to have been given; and because such notice is necessary, under the ordinances, before the Marshal is liable for neglect of duty.

10th. Because Council, after allowing said Shaw to make full defence by legal Counsel, and during the prosecution of the case, and while one of defendant's Counsel was addressing the Council in the case, passed an order restricting all debate by Counsel to one speech on each side, in the after stages of said trial, upon any one point—thereby embarrassing his defence.

11th. Because, since the action of Council in the premises, and the publication of their said proceedings, under their authority, in the city papers, and before the confirmation of the proceedings at the next meeting of Council, (according to the rules) the Council have been instructed, by a majority of all the votes in said city limits, by a memorial presented by them at said next meeting of Council, to reinstate said Shaw in office on certain conditions, which he then and there agreed to perform, and to which no objection was made; and that it was error in the Council to confirm their said proceedings, and order a new election, under the new circumstances of the case.

And your petitioner avers that notice has been given to the said Mayor and Council of this application for *certiorari*, and that he has not given any bond and security nor paid any cost, neither being required of him.

Whereupon, petitioner alleges error in the said Mayor and Council in the premises, upon all points taken and hereinbefore fully expressed and set forth. Therefore, to the end that said errors may be corrected, and justice done to your petitioner, may it please your Honor to grant to your petitioner, the State's writ of *certiorari*, directed to the Mayor and Council of said City of Macon, requiring them, through their proper officer, to copy and send up the proceedings in said case, to the next term of the Superior Court to be held in and for said county. And may it please your Honor to grant unto your petitioner a new trial in said case, or such other order as may seem to your Honor proper in the premises, and in conformity to the principles of law and justice; and that in the mean time, all pro-

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ceedings by said Council be stayed. And as in duty bound, your petitioner will ever pray, &c.

LANIER & ANDERSON.

HALL & CAREY.

STUBBS & HELL.

ROBERT A. SMITH.

COUNCIL CHAMBER, JUNE 10TH, 1853.

REGULAR MEETING.

Present—The Mayor.

Aldermen Holt, G. W. Adams, O. F. Adams, Johnston, Smith, Rogers, Clayton and Whittle.

Alderman Johnston's resolution, laid on the table at the last meeting, being the first business in order.

On motion of Alderman Holt, action was suspended until the investigation of the charges against the Chief Marshal was disposed of. Yeas—Holt, Whittle, G. W. Adams, Clayton and Mayor—5. Nays—Johnston, O. F. Adams, Smith and Rogers—4.

The case of H. W. Shaw, principal Marshal, charged with gambling, was taken up, and after hearing his Counsel at some length, and the witnesses in the case, the question came before the Council, has Mr. H. W. Shaw, principal Marshal, been guilty of gambling on the Sabbath day, within the corporate limits of the city, during the present term of office?

The yeas and nays being called, it was decided that he had. Yeas—Johnston, O. F. Adams, Holt, Whittle, G. W. Adams, Smith, Rogers and Clayton. Nays—none.

Council took a recess for one hour, when the following resolution was passed:

Resolved, That in the opinion of the Mayor and Council of the City of Macon, the Marshal, Harvey W. Shaw of this city, in being guilty of the offence of gambling within the corporate limits of said city, has been guilty of malpractice in office and neglect of duty. And it is considered and adjudged by the Mayor and Council of the City of Macon, that Harvey W.

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Shaw be, and is hereby dismissed from the office of Marshal of the City of Macon.

Yeas—Johnston, O. F. Adams, Holt, Whittle, G. W. Adams, Smith, Rogers and Clayton.

Nays—None.

On motion of Alderman Whittle,

Resolved, That the Mayor be requested to order an election for Marshal and Deputy Marshal, in terms of city charter, to fill the existing vacancies.

Carried.

Council then adjourned.

Attest,

A. R. FREEMAN, c.c.

COUNCIL CHAMBER, JUNE 17TH, 1853.

REGULAR MEETING.

Present—The Mayor,

Ald. Johnston, O. F. Adams, Holt, G. W. Adams, Rogers and Clayton.

Absent—Ald. Whittle and Smith.

The minutes of the last meeting have been read, R. S. Laffer, Esq., Attorney for H. W. Shaw, was granted the privilege of reading before the Council a memorial, signed by two hundred and seventy citizens, favorable to Mr. Shaw's being reinstated in his office; also a petition from Mr. Shaw on the same subject.

The action of the Council, in Mr. Shaw's case, being reconsidered, the memorial and petition were suffered to lie on the table, and the minutes were confirmed.

Attest,

A. R. FREEMAN, c. c.

And said petition for *certiorari* was sworn to, as follows:

STATE OF GEORGIA—BIBB COUNTY:

In person appeared before me, E. P. Brown, a Justice of the

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Peace in and for said county, Harvey W. Shaw, who, being duly sworn, deposes and says, that the facts stated in the foregoing petition for *certiorari* are true, to the best of his knowledge, remembrance, information and belief.

(Signed)

HARVEY W. SHAW.

Sworn to and subscribed before me, this the 27th day of June, 1853.

E. P. BROWN, J. P.

And also the following consent was endorsed thereon, viz:

Bill of exceptions herein contained, and the statement of facts have been examined by the Counsel for Mayor and Council and agreed to June 27th, 1853.

(Signed)

POE, NISBET & POE,

Attorneys for Mayor and Council.

And after argument upon said *certiorari* and the proceedings therein set forth, the Court sustained the said *certiorari*, and granted the following order:

CERTIORARI TO BIBB SUPERIOR COURT.

Harvey W. Shaw,

vs.

The Mayor and Council of the City of Macon.

After argument had on the above stated *certiorari* and the proceedings therein set forth and contained, it is ordered and adjudged by the Court, that said *certiorari* be sustained, and the said proceedings before said Mayor and Council be quashed.

And Counsel for said Mayor and Council then and there excepted.

And Counsel for the Mayor and Council of the city of Macon, on this thirtieth day of June in said year, being within thirty days from the adjournment of the said term of the said Court, tender their bill of exceptions, and say, that the Court erred in sustaining said *certiorari*, and in granting said order quashing the proceedings of the said Mayor and Council, as set forth therein.

POE, NISBET & POE, for plaintiffs in error.

LANIER & ANDERSON; STUBBS & HILL; HALL & CARY, for defendant.

By the Court.—STARNES, J. delivering the opinion.

[1.] The first point made in this case is, that in our State the writ of *certiorari* does not lie from the decision of a municipal corporation.

Our Constitution provides, that the Superior Courts “shall have power to correct errors in Inferior Judicatories, by writ of *certiorari*”; and the question here is, whether or not the Mayor & City Council of the City of Macon, when they tried the defendant in error, and dismissed him from his office, were acting as an Inferior Judicatory, in the sense in which that term is used in the Constitution.

A Judicatory has been rightly defined to be a Court of Justice. Was this body acting as a Court, when it tried the defendant? We think so. We think that for the purposes of that trial, it was possessed of all the elements of a Court of Justice; that it exercised these just as it did when any offender against its ordinances was tried before it; and that when it dismissed Harvey W. Shaw, it pronounced a judgment similar, in character, to that which it rendered in all cases of fine or imprisonment, inflicted upon persons violating the ordinances of the city.

[2.] It is next insisted, that the Judiciary Act of 1799 never contemplated the issuing of this writ to such a corporation, but only to bring up a cause from an Inferior Court; and that 20 days’ notice was necessary.

The Judiciary Act of 1799, it is true, does not refer to the writ, as issuing to such a body; nor, indeed, to any other body or Court, except the Inferior Court *proper*. The terms of the Act, generally, have relation to the Superior and Inferior

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Courts, (meaning, by the latter, our county Court, composed of five Justices,) and the 20 days' notice prescribed, applies solely to the latter Court—not to other cases, where the constitutional writ of *certiorari* is issued to other inferior Judicatories.

[3.] We are next called on to determine whether or not the defendant in error was legally dismissed from office.

There was some irregularity, we think, in the notice which was given to him. The terms of that notice, as communicated to him, in writing, would seem to have implied that he was to be put upon trial for the offence of gambling; and we think he may have very truthfully expressed surprise, when verbally informed, on the day of trial, that he was to meet a different charge, viz: malpractice in office, or neglect of duty. We can readily see that himself and Counsel might have been in perfect readiness to meet the first charge; and yet, being notified at so late a moment, not have been prepared to meet the other accusation.

But waiving this, let us look to the more important question—was the Marshal properly removed from office?

The amendment to the charter of the City of Macon, passed February 22d, 1850, authorizes the Mayor and City Council to dismiss the Marshal, for malpractice in office or neglect of duty.

The charge against the Marshal, in this case, was gambling in the City of Macon. This was proven, and nothing else appears, in the record, as proof of malpractice in office or neglect of duty. Did this constitute malpractice in office?

The word *malpractice* cannot be here used, in the technical sense of the term. It is not employed in the sense of *mala praxis*. That is to say, it does not signify that unskilful practice in a professional person, whereby some other person is injured. Nor does it mean mere neglect of duty; for neglect of duty is, in so many words, specified in the Act and in the same sentence. It could only signify some abuse of the duties of the Marshal's office—as extortion, official malversation or other

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such improper exercise of the office. Of course the crime of gambling was none of these things.

Was it neglect of duty? In one sense, it undoubtedly was so. In that sense in which it would have been a neglect or violation of any one's duty. It is clearly the duty of every person to abstain from gambling; and so, of course, it was the duty of this Marshal. But this is not the sense in which the term was used. It was plainly employed in the sense of neglect of official duty—his duty as Marshal—not as a good citizen. What his official duty was, the ordinances will show. The following are the official duties which, it is supposed, he has violated:

1. It is made his duty, by the charter, "upon notice, in writing, from the Mayor or any member of the Council, to prosecute all offenders against the laws of the State, for crimes committed in the City of Macon". And in case of any offence committed in his presence, or within his knowledge, "it shall be his duty to prosecute, without notice". Here is a clear and definite duty prescribed, a violation or neglect of which would seem to be a sufficient cause for the removal of this officer, if the Mayor and City Council, themselves, had not, by their ordinance, otherwise enacted. We find that in the 5th section of the ordinances, under the head, *Marshal and Deputy Marshal*, it is declared that it shall be the duty of the Marshal to prosecute all offenders, &c. in the City of Macon. And if he shall "fail or refuse to do so, when notified so to do, by the Mayor or any member of Council, he shall be removed from his office". Here the corporation have plainly restricted their right to remove this officer for not prosecuting, to cases where he shall fail or refuse to prosecute, after being notified so to do.

It is not pretended that the defendant in error failed or refused to prosecute on this occasion, after being notified, nor was this the charge. Indeed, it does not appear, by the record, that he did not prosecute. He could not, therefore, for this cause, have been removed.

2. Similar observations may be made in relation to the duty

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of the Marshal, as prescribed by the 3d section of the ordinances under this head.

8. The duty of the Marshal, prescribed by the 8th section of the ordinances under the head, *Nuisances*, as cited by the learned Counsel for the plaintiff in error, requiring that officer to "arrest all persons offending against the public safety, morality or decency", does not apply to cases of gambling, but to cases of nuisance, or *quasi* nuisance. This Marshal did not violate that section therefore.

4. Neither does the 7th section, under the head, *Marshal and Deputy Marshal*, apply to cases of gambling, but to cases of disorder, drunkenness or riot in the streets.

These are all the duties of the Marshal which have been referred to, as having been violated by the defendant in error. And it must be very plain to every one, that the act of gambling, charged and proven against this defendant in error, was not such a neglect of the duties imposed by these ordinances, as authorized the dismissal of the Marshal, according to the charter, unless the act of gambling, *in itself*, constituted such neglect of duty. That it did constitute neglect of *official* duty, we cannot think. He had no warning to this effect—no notice, that if, while holding the office, he gambled he would be dismissed—he did not take the office with any such understanding; and though the act was highly immoral and criminal, yet, it was not a neglect of duty—in the sense in which the Legislature used the terms.

We can but express regret, that we have been compelled, by a sense of our own duty, to take this view of the case before us. It would have given us great pleasure, if we could have sustained the Mayor & City Council of Macon, in the action which they have taken against this defendant in error, who proved himself, in point of moral conduct, so unworthy of the office which he held. We would fain have given them aid in the effort to suppress this abominable vice of gambling in their community. They need such aid, if this record is to be believed. It is a sad report which it makes of the state of morals, as regards this vice, in that flourishing and thriving city.

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By the record before us, it appears, that not far from one hundred and fifty presentments, for this offence, were made by the Grand Jury, at the time this defendant in error was presented; and that other persons, besides the Marshal, charged with important official duties, and responsible for the good order and morals of the place, were, at the same time, put under accusation; and afterwards, punished for this same offence of gambling. And we are sorry, indeed, that we cannot, by our judgment, aid those who, by rebuke and punishment of the defendant in error, have manifested a desire to lessen the frequency of this crime, in a community where it is so prevalent. If we have not done so, it is only because we could not, and yet have regard to those legal principles to which every citizen, however immoral his conduct may have been, has the right to look, as safeguards of his person and property.

So far as we can tell from the record, no objection was made to this proceeding in the Court below, on the ground that no effect could now be given to the judgment of the Court, even if it should find that the Mayor & City Council had committed error in dismissing this Marshal from office, inasmuch as the time for which he was elected has transpired, and he could not be restored to office by the judgment. And as the Court below was not asked to give an opinion on this point, and appears to have given none, we suppose it is right that we should not. The parties seem to have made a case for the Court, and to have been satisfied to take the judgment on the points presented.

Let the judgment be affirmed.

No. 25.—NATHANIEL C. DANIEL, and his wife, ELIZA N. DANIEL, plaintiffs in error, vs. JAMES S. HOLLINGSHEAD and NATHAN BRYAN.

- [1.] When an executor or administrator finds it necessary to bring suit upon a debt, which, in the management of his testator's or intestate's estate, he has suffered to be contracted with him, for and on account of said estate, he may, at his option, declare upon that debt as one due to him in his representative character, or as due to him personally.
- [2.] If he mean to declare on such a debt in his representative character, he should show in his petition, that the debt is due to him, as such, by setting forth that it is owing and payable to him "as executor".
- [3.] Where plaintiffs sue as administrators of J W H, and so recover a judgment, upon which the costs cannot be collected from the defendants; and the officers of Court issue their execution for the same (under our Statute) against these plaintiffs, as administrators of J W H: Held, that such *fi. fa.* could not properly be levied on property in the hands of one of the heirs, which had been of the estate of J W H, and which the heir had received in settlement with the administrator; that the title of the heir to the property sold under such levy, was not divested, and that he had the right to recover the same from the purchasers at Sheriff's sale.
- [4.] The doctrine, that a purchaser without notice, for a valuable consideration, is entitled to the protection of the Courts, applies where there is prior equitable title only: but where there is prior legal title, the rule is, *caveat emptor*.

Ejectment, in Macon Superior Court. Tried before Judge POWERS, March Term, 1854.

This was an action of ejectment (in Jones' form) brought by the plaintiffs in error, for the recovery of lot of land, number 81, in the 8th district of originally Houston, now Macon County.

On the trial, plaintiffs read in evidence a plat and grant from the State to John W. Harper, for the lot of land, dated the 6th day of November, 1829.

Plaintiffs then proved the death of John W. Harper, and that Mrs. Daniel, the plaintiff, was his sole surviving heir at law; and the possession of defendants, and closed.

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The defendants then read in evidence a deed from the Sheriff of Macon County, executed to themselves, on the 4th day of July, 1848, Counsel for plaintiff having consented to waive the production of the *fi. fa.* under which the land was sold, and admitted that it was set forth correctly in the deed, as follows: "The officers of the Superior Court of the County of Clark, against Anslemm L. Harper and William Shaw, administrators of John W. Harper, deceased."

The defendants closed, when plaintiffs offered in evidence exemplifications from the records of the Court of Ordinary and the Superior Court of Clark County, from which it appeared that Anslemm L. Harper and William Shaw were appointed administrators on the estate of John W. Harper, deceased, by the Court of Ordinary of Clark County, at the November Term, 1836.

That, at the February Term, 1846, of Clark Superior Court, Harper and Shaw, administrators of John W. Harper, deceased, brought an action of debt against the makers of the following note:

"Twelve months after date, we, or either of us, promise to pay the administrators of John W. Harper, deceased, the right and just sum of four hundred dollars and twenty-five cents, for value received, this 6th day of February, 1838.

SOLOMON P. KENT.

THOMAS A. TUCK.

WILLIAM SHAW."

There being several credits on said note, the last entered in January, 1846; on which note they obtained judgment at the August Term, 1847. Execution was issued thereon, and returned by the Sheriff, with the entry of "*nulla bona*" thereon, on the 16th day of December, 1847; whereupon, the Clerk issued a *fi. fa.* for cost against the plaintiffs.

Counsel for the defendants objected to the introduction of the exemplifications. The Court sustained the objections, and Counsel for plaintiffs excepted.

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S. HALL and T. R. R. COBB, for plaintiffs in error.

J. J. SCARBOROUGH, for defendants in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] When an executor or administrator finds it necessary to bring suit upon a debt, which, in the management of his testator's or intestate's estate he has suffered to be contracted with him, for and on account of said estate, he may, at his option, declare upon that debt, as one due to him in his representative character, or as due to him personally.

[2.] If he mean to bring the suit in his representative character, apt and fit words should be used, for the purpose of manifesting such intention. When, in such case, he declares on such a contract, it seems, by the rules of pleading, not enough that he should simply style himself *executor* or *administrator*—that he should describe himself in his petition, for example, as “A B executor of C D;” for this, it is held, only shows that the debt was contracted with him in that character, but does not show that he has elected, in his suit, to treat it as the debt of the estate. It is said, that subjoining to his name, in such a suit, the word “executor” or “administrator” is simply a *designatio personæ*; and that if he mean to have the debt treated as one due to him, strictly in his representative right, he must describe it as such, by annexing the words “as executor” or “as administrator” to his name. *Brigden vs. Parke*, (2 Bos. and P. 424.) *Henshall vs. Roberts et al.* (5 East. 150. 6 East. 405. 2 Bing. 177. 9 Moore, 340.) *Hollis and another vs. Smith*, (10 East. 293. 1 Ch. Plead. 233, 234. 2 Saund. 117 d and notes, 5th ed.) *Gilbert vs. Hardwick*, (11 Ga. 599.)

This rule seems to be rather arbitrary, and the reasons for it not very satisfactory: but this does not matter much, perhaps, if it be well understood to be the law. As a rule, it

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seems very well settled indeed, and the case before us must be tried by it.

[2.] The judgment for costs, under which this land was sold, was entered up in a suit which had been instituted upon a promissory note, made and executed by Solomon P. Kent and others, in favor of, and payable to "the administrators of John W. Harper." We find by the record, that suit was brought in the name of "Anselm L. Harper and William Shaw, administrators of John W. Harper, deceased." The verdict is for the "plaintiffs"; the judgment follows the verdict, and the execution issued in favor of "Anselm L. Harper and Wm. Shaw, administrators," &c. They have not sued *as administrators*, and, therefore, according to the above rule, they did not elect to treat the debt other than as one personally due them.

Of course, if the recovery was their's, personally, and the costs were due to them personally, all the incidents of such recovery must take effect with reference to them, and in no wise have relation to their intestate's estate. The officers, then, should have issued their *fi. fa.* against Anselm L. Harper and Wm. Shaw, the plaintiffs in the case, and have caused a levy to have been made upon their property; for, according to the law which prevails on this subject, they had no right, whatever, to have this execution levied upon the land in question, belonging to the plaintiffs in error, and received from this estate; and the title of plaintiffs in error, was, of course, not divested by the sale.

The Court erred, therefore, in rejecting the exemplifications of the record from Clark County, offered for the purpose of showing that these administrators had declared on said note in their individual, and not their representative character.

Not only does the record, which was thus rejected, show that these administrators had elected to treat this debt as their own, and not a debt of the estate; but the settlement between them and the heirs, as proven by the depositions of Green

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B. Haygood, Esq. seems to encourage this conclusion, and hence these depositions should have been admitted.

[4.] The doctrine that a purchaser without notice, for a valuable consideration, is entitled to the protection of the Court which was invoked by the Counsel for the defendant in error does not apply to such a case. That doctrine is applicable where there is prior equitable title only; but where there prior legal title the rule is *caveat emptor*.

Here, if there was no foundation for an execution for costs against the estate of John W. Harper—if the officers were not entitled, as they clearly were not, to enter up judgment against the goods and chattels, rights and credits of John W. Harper, in the hands of Anselm L. Harper and William Shaw, as administrators, &c. they should not have caused their execution for costs to be levied on property of the plaintiffs in error, which had been property of the estate; the levy was a trespass and the title of plaintiffs in error was not divested by the sale. Such title remained in them, and the purchasers cannot be protected against that title.

These considerations dispose of the case, and make it unnecessary for us to examine any other point made by the plaintiffs in error.

Let the judgment be reversed.

No. 26.—WILLIAM G. LITTLE, plaintiff in error, vs. BRYAN INGRAM, et al. defendants.

[1.] Process not issued in compliance, substantially, with the requirements of the Judiciary Act of 1799, or the Amending Act of 1840, concerning waiver of process, is null and void. Such defect vitiates the whole proceeding, and is not a mere irregularity.

[2.] Where the defendants to an action of ejectment, at or before the time when the same was returnable, went before the Clerk, to whom the same

was returnable, and agreed to acknowledge service, and waive process, and that officer accidentally neglected to insert such waiver in the acknowledgment, indorsed by him upon the petition, and which was signed by the parties, and did not attach process thereto; and where, after verdict and writ of possession issued, an affidavit of illegality was made, on the ground of such want of process, or of waiver, and the same was returned to the Superior Court, at which a motion was made to set aside said writ of possession, because that process had not been attached to the petition, or waived: *Held*, that upon proof made to the satisfaction of the Court, that waiver of process had been accidentally omitted by the Clerk, from the acknowledgment of service, which he endorsed upon the petition, and which was signed by the defendants, that this omission might, under the direction of the Court, be supplied by amendment, *nunc pro tunc*.

[2.] Where a motion was made by the plaintiff in *st. fa.* to continue such a case, for the purpose of procuring the testimony of one of the defendants making such waiver: *Held*, that it was error in the Court to refuse such continuance.

Motion to set aside judgment, in Crawford Superior Court. Decided by Judge POWERS, March Term, 1854.

This was a case in which an action of ejectment had been brought by the plaintiff in error, against the defendants. Pleas had been filed and a verdict had—judgment entered up and a writ of possession issued; to which, an affidavit of illegality was filed, and at the next term of the Court, a motion was made to vacate the judgment, on the ground that no process had been attached to the original declaration, nor any copy of process served on defendants; nor was there any waiver of process by defendants.

There was, on the original declaration, the following entry: "We acknowledge due and legal service of the within, and waive the necessity of a copy and service thereof by the Sheriff. June 29, 1849.

(Signed)

N. H. SCARBOROUGH,
BRYAN INGRAM,
By T. H. Montfort, Atty".

The plaintiff proved by T. H. Montfort, Esq. that he signed the acknowledgment of service for Bryan Ingram, as his At-

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torney: that he did not read it: that his object was to save his client costs: and that he did not think anything about whether process was waived or not; but that his client afterwards ratified what he had done; plaintiff also proved by J. J. Ray, the Clerk who drew up the acknowledgment of service, that he had intended to insert a waiver of process, and supposed he had done so, that the omission was by mistake. Plaintiff moved to direct the Clerk to annex process *nunc pro tunc*, which was refused. He then moved to amend the acknowledgment of service, by adding a waiver of process, which was refused. He then moved to continue the cause, for the purpose of filing interrogatories for H. N. Scarborough, one of the defendants; by whom he stated, that he expected to prove that it was the intention of the parties to waive process. This, also, was refused, and the Court passed an order vacating the judgment. To which decisions and rulings of the Court, plaintiff excepted.

S. & R. P. HALL, for plaintiff in error.

HUNTER; BAILEY, for defendant.

By the Court.—STARNES, J. delivering the opinion.

[1.] The mischief which the 8th section of the Judiciary Act of 1799 (relating to process) seems to have been intended to remedy, was the inconvenience arising from the great multiplicity of the forms and requisites of process, for the commencement of actions at Law. Previous to the passage of that Act, the practice of the English Courts, in this respect, was of force in our State, and not a little trouble and difficulty must sometimes have been found, in selecting the process suitable to the action to be brought. It was undoubtedly to obviate this serious inconvenience, that the Legislature prescribed, not a precise form, but certain requisites which should be found in every process. And more effectually to remedy the great evil which they had in view, and ensure compliance with the terms imposed, they adopted a stringent provision, that "all process issued and returned in any other manner," should be "null and void".

They thus endeavored to take surety that the Act should be what was intended—a uniformity of Process Act.

We can readily conceive, that in view of these things, Courts giving contemporaneous construction to this Act, should have felt it their duty, in good faith, to enforce it in the spirit of its enactment, and should have held, that if a defendant was brought into Court by a simple service though he waived process in writing, or if he appeared and pleaded without process, and not objecting, that still he was brought into Court, by a proceeding issuing forth, in a manner other than that prescribed by the Statute, that this was therefore wholly void. Such seems to have been the contemporaneous exposition of this Statute, in the three oldest Judicial Districts of this State; and as a general rule, perhaps, it has continued to be the construction in all parts of our State.

It seems to have been sometimes decided, that if the defendant expressly waived process, the same need not be attached; but this does not appear to have been well settled, until the Act of 1840 was passed.

The provision in the 9th section of the Act, of '99, to the effect, that "no answer, return, process, judgment, or other proceeding, in any civil cause, shall be abated, arrested, reversed or quashed for any defect in matter of form, &c., but the Court, on motion, shall cause the same to be amended at the first term" &c., does not disturb the view we have taken.

That clearly refers to such mistakes, in form, or clerical errors in the process, as might be made, when there was a compliance with the chief and substantial requisites of the Statute. The two provisions are accordingly in harmony.

This reasoning brings us to a conclusion, that a process, substantially complying with the requisites of the Act of 1799, or a distinct waiver of such process, by the defendant, is a necessary condition precedent, to an action at Common Law; that the absence thereof is a fatal defect, which vitiates the whole proceeding—is not a mere irregularity, and cannot be dispensed with by acknowledgment of service or appearance and pleading. And this reasoning satisfies us, too, that the deci-

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ion of this Court, upon this point, in the case of *Beall vs. Blake*, (18 Ga. R. 267,) was correct, and is sustained by most of the cases there cited.

[2.] Whatever may have been the views previously entertained by our Courts, the Act of 1840 has settled the law, that a defendant may waive process; and that after he has done so, the cause is rightly in Court.

In the case before us, the plaintiff in error contends that sufficient proof was made before the Court below, of the waiver of process, in compliance with the Act of 1840; and that it was by the accidental omission of the Clerk, that such waiver does not appear in connection with the petition; that consequently, the record might have been amended, at any stage of the proceeding; and that the amendment which was moved, should have been allowed.

It is true, that Courts may cure the accidental errors or omissions of their officers, and direct amendment of their records accordingly. This is a familiar and well settled rule. And we have no doubt that if there were a waiver of process, in this case, made before the Clerk, at the time service was acknowledged, and that Clerk was authorized to insert the same in the acknowledgment of service upon the petition, and accidentally neglected or omitted so to do, that this is such an error or mistake in this record, as may be amended after verdict. In such event, the proceeding would not have been defective *ab initio*, inasmuch as a waiver of process had been given and the defendant had come into Court, or had been brought into Court, in conformity with the requirements of our Statute Law.

Whether the testimony, to this point, which was before the Court below, sufficiently proved such waiver, we do not deem it necessary to decide, as there was another point on which we prefer to dispose of the case.

[3.] A motion to continue was made by the plaintiff in error, in order that the testimony of Henry N. Scarborough might be procured.

According to the case as made by the record, that witness would have sworn, that as one of the original defendants to

a case, he intended, when acknowledging service, to waive process. This testimony, in connection with that of Montford Ray, bears immediately upon the question of proof, as to aver of process by those who were the original defendants the bill, and should have been heard by the Court; and we think that the Court erred in not allowing a continuance, in order that it might have been procured.

The motion to continue seems to have been presented at an advanced stage of the case; but no objection, on this account, appears to have been taken, and no point is made before us, on this ground.

If, upon hearing this testimony, the Court should become satisfied that the process was waived by the defendants, at the time service was acknowledged, and that it was by the accidental omission of the Clerk, that such waiver had not been inserted in the acknowledgment of service which was indorsed on the petition, we think that the principles of substantial justice require that he should direct an amendment to be made accordingly, *nunc pro tunc*.

It has been supposed that what fell from this Court in the concluding paragraph of the decision in the case of *Beall vs. Lake*, (13 Ga. 217,) is opposed to what we have just suggested the proper disposition of this case. But the judgment in that case, as in all other, should be construed in the light of the circumstances. The Court decided there that a motion to amend and attach process, made after application to set aside the judgment, came too late. *Ca. sa.* had issued—the defendant has been arrested—was in custody—moved to vacate the judgment—and the Court, with direct reference to the state of facts, says, “the attempt, at this late day, to resort to original proof to supply the defect in the proceedings, as to retain the defendant in custody, under the execution on which he had been already arrested, cannot be sanctioned”.

If such difficulty exists in the case now before us; and the two do not, therefore, conflict.
Judgment reversed.

John (a slave). *vs.* The State.

No. 27.—JOHN, (a slave) plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant.

- [1.] Every one, whether bond or free, who is indicted for killing another in this State, is, in legal intendment, indicted for killing a free white man. If the killing is of a slave or free person of color, or any one within the exceptional cases, the indictment should so charge it.
- [2.] A remark made by the Juror, at the moment of the trial, who neither knew of the offence or the offender, made for the purpose of getting off from serving on the Jury, is no disqualification.
- [3.] Before the accused shall be considered as having used due diligence to ascertain the competency of a Juror, would it not be best to require that the test as to indifference, furnished by the Act of 1843, be applied, before the Juror is accepted by the prisoner? *Quere.*
- [4.] Where the character of a witness, who is sworn on the direct examination, is impeached, it is competent for the State to introduce testimony, to the effect that the facts testified to by the discredited witness, are true.
- [5.] A judgment of the Circuit Court will not be reversed, on the ground that the Judge rendering it, admitted *legal testimony* at any stage of the trial.
- [6.] Neither the Acts of 1816 or 1821, relative to the trial of slaves and free persons of color, contain any definitions as to the various grades of homicide. And recourse must be had for this purpose, to the 4th division of the Penal Code.
- [7.] The killing of a free white man by a slave cannot be *manslaughter*.

Indictment for murder, in Bibb Superior Court. Tried before Judge POWERS, November Term, 1853.

The defendant, John, was indicted for the murder of Mark Swinney. For the State, Fardy Swinney, the father of deceased, testified to the facts of the murder. The defendant's Counsel, when the State had closed, moved for a verdict of acquittal, on the ground that the indictment did not disclose the *status* or condition of the deceased; that is, did not state whether he was a free white person, or a slave, or free negro, or an Indian. The motion was refused, which is alleged as error.

Several witnesses were then introduced on behalf of the defendant, by whom the general character of the witness, Fardy

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Swinney, for truth, was attacked. The defendant's testimony being concluded, the State called James Dimon, who proved facts going to show that the deceased had died from wounds with a knife, as Fardy Swinney had testified.

This evidence was objected to as not being in rebuttal. The Court over-ruled the objection; which is alleged as error. The presiding Judge, in his charge to the Jury, read to them, as law applicable to the case, from the 4th to the 11th sections of the Penal Code, which is excepted to.

The Jury returned a verdict of guilty.

After the verdict, defendant's Counsel moved for a new trial, on affidavits showing that one of the Jurors, after he was summoned as talesman, and before he was sworn in chief, had said that if he was on the Jury he would hang the prisoner—which fact was not known to the prisoner or his Counsel, before the trial.

The State, in showing cause against the motion, produced the affidavit of the Juror in question, stating that he had made the remark as a mere idle jest—that he did not then know who had been killed, or what negro was to be tried; and that he made up his verdict solely on the evidence, and the law, as charged by the Court.

The motion was refused, and this also is alleged as error.

WHITTLE; R. P. HALL, for plaintiff in error.

DEGRAFFENBEID, Sol. Gen. and LOCHRANE, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] As it respects the supposed defect in the indictment, our opinion is, that it means a free white man, and no one else. Every one, whether bond or free, who is indicted for killing another in this State, is, in legal contemplation, indicted for killing a free white man. And, under this indictment, the ac-

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could not have been put upon his trial for the killing of a slave or free person of color. If the killing is within one of the exceptional cases, the indictment should so state it.

[2.] We have often, of late, had this objection as to a Juror, urged upon us as a ground for a new trial. And we must say, that this is the weakest case which has yet been presented. It is apparent, that the Juror made the remark attributed to him, at the moment, and for the purpose, probably, of getting off from serving on the Jury.

[3.] As this ground comes up in every application for a new trial, in a capital case, we may feel it to be our duty, before entertaining it at all, to require the accused to apply the test furnished by the Act of 1843, for ascertaining the indifference of a Juror.

By the XXXVIIIth section of the Judiciary Act of 1799, all exceptions to Jurors in *civil cases*, must be taken, before they are sworn. (*Cobb's Dig.* 546.) The spirit of this provision would seem to require that due diligence, at least, would be required, before a new trial would be granted in a *criminal case*, on account of the disqualification of the Juror.

[4.] As to the introduction of James Dimon, whose testimony, it is contended, was not in rebuttal, we have this to say: the witness proved facts which went to sustain the veracity of Fardy Swinney, whose character was impeached.

[5.] Moreover, we could hardly get our consent to reverse a judgment, on the ground, that the Court rendering it erred in admitting legal testimony, at any stage of the trial. We do not say that we would over-rule a Judge for refusing to allow it, under all circumstances.

[6.] The last assignment is, that the Court erred in reading to the Jury, by way of charge, from the 4th division of the Penal Code; and from the 1st to the 11th section, inclusive, of that division.

From what else should the Judge have read, to instruct the Jury, as to the law of homicide, both as to its definitions and various grades? Neither the Acts of 1816 or 1821, or any other statute, exclusively applicable to slaves, defines murder

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or justifiable homicide. The presiding Judge, then, must have resorted to the Common Law or the Penal Code, or left the Jury uninstructed as to their duty.

We think he was right in looking to the Code for the Law, especially as the Act of 1850, providing for the trial of slaves, enacts, that from the finding of the bill to the rendition of the verdict, the trial shall be governed by the Code. This includes, of course, the definition of the offence.

[7.] If there was error in the Court at all, it was in submitting to the Jury those sections of the 4th division as to manslaughter; an offence, which, in the opinion of this Court, cannot exist under our law, as between a slave and a free white person, where the former is the slayer. That every such killing is murder, or justifiable homicide. It is supposed, that where a slave is under an absolute and inexorable necessity, to take the life of a white man to save his own, who has no right to punish him or control him in any manner whatever, that such killing will be excusable. And it may be so. For myself, I have formed no very definite opinion upon this subject. But a stern and unbending necessity forbids that any such allowance should be made for the infirmity of temper or passion, on the part of a slave, as to reduce or mitigate his crime from murder to manslaughter.

No. 28.—JOHN D. DACY, plaintiff in error, vs. SHERRILL H. GAY, defendant.

[1.] It is only in cases of felony at *Common Law*, and of treason, that in our State, the civil remedy is suspended until after the conviction of the offender for the same.

[2.] The terms of our Penal Code, relating to the offence of harboring a slave, make no change in this rule.

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[3.] Where D is found in possession of, harboring, controlling, and hiring out a negro slave, a few months after he had wrongfully left the possession of his owner, G; and at the same time the evidence showed that the possession of D must have commenced under circumstances which should have put him upon inquiry as to the ownership of the slave, and where it appeared that D continued for many months so to possess him, and no such inquiry was made, and no explanation was given by him: *Held*, that D might be presumed to have come into possession of the slave, by enticement or other unlawful means, at the time of his disappearance, and might be made accountable for the hire of said slave from that time.

[4.] Upon a motion for a new trial, on the ground that the verdict of the Jury was erroneous, because for an amount which no state of the facts, and no view of them could correctly sustain: *Held*, that if the Court find by any one calculation which the evidence will plainly and reasonably authorize, whether it be the same made by the Jury or not, that the finding might have been made for that amount, a new trial should not be granted.

Case, in Bibb Superior Court. Tried before Judge POWERS,
May Term, 1854.

This was an action brought by Gay against Dacy, for harboring a slave named Joe, the property of plaintiff, and for the value of his services during the time he was so harbored.

The plaintiff proved property in the negro; that he was run away from him, from April 1st, 1851, until November 8th, 1852; that the defendant had him in possession, and professing to be acting as the agent for one John Thompson of Newton County, hired him out to work, with the firm of Henderson & Carlisle for nine months on a rail road contract; that a man named Lindsay, for two months hired him out and received the money for his hire, previous to the last of said dates. It was proven that Henderson & Carlisle paid Dacy for the negro, twenty dollars a month, and that his labor was worth from 20 to 30 dollars per month. It was also proven that Dacey took the slave from Henderson & Carlisle, because they would not pay more than \$20 per month, and hired him, or used him in Macon. It was also proven that defendant had, some years previously, known the negro Joe as the property of Mr. Gay; that he had worked with him a year or two. Also, that he called the slave at one time Dave, at another Pompey.

Defendant moved to non-suit the plaintiff, on the ground that no civil action would lie, until a conviction for the crime. This motion the Court refused, and defendant excepted.

The testimony being closed, the Court charged the Jury, that if Dacy had gotten possession of the negro under circumstances that should or ought to have put him upon inquiry as to the fact of his being a runaway; and he was not vigilant and careful in his inquiries, whether he was so or not, that they had a right to infer that his possession of him began at the time that he ran away, unless there was evidence to show that for some part of the time he did not have him; if so, they should deduct such part of the time.

The Jury found for the plaintiff, Three Hundred and Eighty Dollars.

Whereupon, defendant moved for a new trial, on the ground of error in the above stated charge of the Court, and because the verdict of the Jury was against the weight of evidence, and unsupported by evidence. He likewise moved in arrest of judgment, on the same ground before taken for a non-suit.

All these motions were over-ruled by the Court—which decisions are alleged as error.

LAMAR, LOCHRANE, WHITTLE, for plaintiff in error.

POE, NISBET & POE, for defendant.

By the Court.—STARNES, J. delivering the opinion.

[1.] According to the views which this Court entertains, and has before this time expressed, it is only in cases of felony at Common Law, or in the crime of treason, that the civil remedy is suspended until after the conviction of the offender for the crime. (*Adams vs. Barret*, 5 Ga. 404. *Neal vs. Farmer*, 9 Ga. 555.) This is, of course, not such a case.

[2.] The terms of our Penal Code, relating to the offence before us, make no change in this rule. These terms are, that

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"on every conviction for concealing or harboring a slave, the owner of such slave may recover damages, in a civil suit, for the loss of the labor and services of such slave, notwithstanding such conviction"; and we think they were, in this connection, inserted, simply to negative the idea that a civil suit was, in any way, to be hindered by a prosecution for the crime. This precaution was most probably taken, in view of the fact that the Penal Code of 1833 (where the proviso is first found) declared, that the offence should be punished by a fine "not exceeding the value of the slave", or imprisonment, &c. Anxious to suppress this vice, and apprehensive, perhaps, that it might be supposed, that by making the measure of the fine the value of the slave, they had not intended that the wrong-doer should be made to respond twice to the value of the slave, they probably inserted this provision. And when this section of the Code was amended in 1838, and imprisonment in the penitentiary substituted, the Legislature, probably, without thinking of the motive in which it had its origin, again adopted this proviso. Hence, in our opinion, this civil remedy was not suspended by the crime, and the suit was properly brought.

[3.] The charge of the Court, that if the negro had come into the possession of the plaintiff in error, under circumstances which should have put the latter upon inquiry, as to the fact of his being run away, and he was not careful to ascertain this, he might be held responsible for his possession during the whole time, in our opinion, was not erroneous.

The evidence shows that defendant had the negro in possession—controlled him—received hire for him during a number of months, and gave receipts for the hire—that he had known him previously, as the property of his owner, Mr. Gay, and had then worked in company with him a year or two; that during the time he was hiring him out and receiving wages for him, he professed to be doing this in the name of one John Thompson of Newton County; that the slave had a pass purporting to be signed by John Thompson; and Dacy also produced a letter purporting to be signed by him; that defendant in error had known this negro by the name of *Joe*; and yet,

that he hired him out by the name of *Dave*; and that at another time, he called him *Pompey*. All these were circumstances which might have been properly considered, as authorizing a presumption, unless they were explained, that the defendant in error had not come honestly and properly into the possession of the negro; and which were sufficient, in the absence of any explanatory proof by him, to authorize the presumption, that he had taken or enticed the negro, thus found in his possession, from the owner, and to justify a Jury in holding him answerable therefor, in damages.

We know that if the rightful owner of personal property lose the same from his possession, and within some reasonable time thereafter, the property be found in the possession of another, the law puts upon the latter the *onus* of accounting for his possession; and if he fail to do this, authorizes a presumption of the wrongful or felonious asportation of that property by him. This presumption is more or less strong, of course, according as the possession is more or less recent.

If this rule be just where the liberty of the citizen is at stake, it would seem very reasonable, where a person is found harboring, and controlling, and hiring out a negro slave, a few months after he went wrongfully from the possession of the owner, and at the same time, the evidence shows that whensoever that possession commenced, it must have occurred under circumstances which should have put the party upon inquiry, as to the true ownership of the slave, and that no such inquiry was made, nor any explanation given; that in such case, the wrong-doer should be presumed to have come into possession of the slave by enticement, asportation or other unlawful means, at the time of his disappearance, and should be made to account for the hire of the same, from that time. This and nothing more, was the effect of the Court's decision.

It has been insisted that the verdict of the Jury is erroneous, because the exact amount found (\$380) is not authorized by any state of the facts. Let us see.

The slave is proven to have been gone from his owner about 18 months. His services were shown to have been worth from

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20 to 30 dollars per month. The evidence proves that the slave was hired to Messrs. Henderson & Carlisle, for nine months of this time, for twenty dollars per month, and that he was removed because these gentlemen would not pay the defendant in error a higher price for him. It was fair to suppose, that if the latter would not take twenty dollars per month for him, that for the other nine months he did receive a higher rate per month. If the Jury took the medium sum between twenty and thirty, viz: twenty-five dollars per month, this would give \$180 for the first nine months, and \$225 for the next nine; together, making \$405.

Now, the evidence shows, that a person by the name of Lindsay, for two months of this time, received the wages for the slave, claiming the right to do so, for Mr. Thompson, the pretended owner; and if the Jury believed, (which the circumstances might well authorize) that this Lindsay was a confederate with the defendant in error, and received a portion of the gains, and if they allowed to him one-half of the two months' wages at \$25 per month, and deducted this amount from the sum of \$405, they would have arrived at the exact sum of \$380. And this seems to be not at all an unreasonable or unjust view of the matter.

There might, perhaps, be other calculations made, by which the verdict could be sustained, but this is sufficient.

Let the judgment be affirmed.

No. 29.—JOHN BELCHER, plaintiff in error, *vs.* ABSALOM GREY and WILLIAM R. PHILLIPS, executors of Matthew B. Telli-son, deceased, defendants.

[1.] Where suit is brought on an open account for board, and the testimony establishes that a certain portion of it is due, but leaves it uncertain as to

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the remainder, the Jury are bound to find a verdict at least for the amount proven.

Assumpsit, in Spalding Superior Court. Tried before Judge STARKE, May Term, 1854.

This was an action brought to recover the price of board, furnished the defendant's testator, for himself and his horses, for the years 1847 and 1848, at 5,00 dollars per month.

It appeared from the testimony, that Tollison was a wagoner by trade; that he boarded himself and team with the plaintiff, during the years stated, off and on at different periods, but that he was frequently absent, following his business.

No witness could state any definite time that Tollison had boarded at plaintiff's house, except that one said "he was there sick from about the middle of the Spring of 1848, until the latter part of Summer or the first of Fall in that year." Another witness said he was there the "most of the year 1848;" and another, that he was there "the most of the time during 1847 and 1848." Board was proven to be worth more than was charged.

The Court charged the Jury, among other things, that it was not sufficient for them to be convinced that something was due; that they must be satisfied from the proof, that some definite sum was due, before they could find any sum for the plaintiff; and that they ought to scrutinize more closely, a claim made against a dead man's estate than they would in a controversy between the living. To these portions of the charge exception is taken.

The Jury found a verdict for the defendants, on which plaintiff moved for a new trial, on the ground that the verdict was contrary to the evidence, as well as on the ground of error in the above stated charge of the Court.

The Court refused the rule, which decision is alleged as error.

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GREEN & MARTIN, for plaintiff in error.

DOYAL, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We propose to put our judgment in this case, upon the narrowest ground. Judge *Starke*, amongst other things, charged the Jury, that “if they were satisfied, from the evidence, with a reasonable degree of certainty, that there was *any thing* due the plaintiff, they should find *that much* in his favor.”

The verdict was for the defendant, and the Court refused to grant a new trial.

The only question, then, which we propose to consider is, did the proof establish with certainty, that there was *something* due Belcher for board? If it did, the finding of the Jury was both contrary to the testimony, and the charge of the Court, and a new trial should have been granted.

I will advert to only a portion of the evidence.

James D. Abbott testified that he knew Matthew B. Tollison, the defendant's testator, boarded with plaintiff. He does not recollect the exact time he commenced; but that he was there about the 30th of December, 1846, and continued until the first of the year 1849, *for the most of his time*. That he heard deceased say that he intended to pay plaintiff for his board; that he always spoke of plaintiff's house as his home, and that he had his washing and sewing done there. He further stated that Tollison was sick from some time in the Spring of 1848, until the latter part of the Summer or the first of Fall of the same year. The physician, Dr. Peddy, informed witness that his disease was syphilis. Provisions were scarce and high during the time that Tollison lived with Belcher; and witness thinks seven dollars per month for a man and his team, would be a reasonable charge. He says he boarded with plaintiff the entire years 1847 and 1848; that he resided in a mile

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of plaintiff's; saw Tollison there during that time. When he was able to travel, he was on the road with his wagon, most of the time. He never saw Tollison pay Belcher any money for board; never heard plaintiff acknowledge the receipt of any; but on the contrary, always understood from him that he had paid him nothing. Again, this witness swears that Tollison was confined, *most of the time* that he lived with plaintiff, so as not to be able to get about. That Tollison left at the beginning of the year 1849, stating that he would return; but that he never did, and that he often said he would pay plaintiff. He was frequently at Belcher's in 1848, while Tollison was sick; and he would say that One Hundred and Twenty-five Dollars was a moderate amount for the two years' board of Tollison and his team. When Tollison left with his team, he would take corn and fodder for them and provisions for himself.

Sterling Mize swore, that Tollison's occupation was wagoning, and that it would have required him to be most of his time from home: but that during the year 1848, he remained at plaintiff's *most of his time* sick.

In addition to this proof, there was the corroborating testimony of John Lovinggood and Joseph J. Knight.

There can be little doubt but that it was the intention of the witnesses to put the value which they did on the board, making due allowance for the absence of Tollison. But if this were not so, still the Jury would have been warranted in finding a verdict for one-half of the whole time that Tollison lived at Belcher's, beginning 30th December 1847, and ending the 1st of January, 1849. In other words, for one year. But setting aside the testimony of Abbott, Mize swears that Tollison spent *most of the year* 1848 at plaintiff's, on account of his sickness. How then could the Jury excuse themselves for not finding for the six months' board, thus positively established?

But coming down still more, the testimony is certain and indisputable, that Tollison was confined at one time, at the house of plaintiff from sickness, from the Spring of 1848, till the latter part of the Summer, or the first of the Fall of that year. The Jury were constrained, therefore, to find for at

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least two months and a half board. And to do otherwise, was to disregard the proof as well as the charge of the Court.

His Honor, the presiding Judge, reminded the Jury in the beginning of his charge, that the action was brought to recover an account against the estate of a *dead man*.

And that it was their duty to scrutinize it the more closely on that account; or to use the language attributed to him by Col. Doyal, the Counsel for the defendant below and in error, he considered himself "as standing between the living and the dead." And it is right that the estates of the dead should be narrowly watched. It is a most commendable vigilance—for they are no doubt often plundered by spurious claims. *Every* man living, has a personal interest in this matter, for it is appointed unto *all* men once to die.

There is, however, another consideration in this case, which should not have been overlooked. It is a suit in behalf of the citizens of a sister State, against one of our own people. Courtesy requires—our respectability as a State demands, that non-residents who come into our Courts to seek justice at our hands, should feel that it has not been improperly withheld from them. To refuse a new trial in this case, is not only to say, in substance, to the plaintiff, that he has trumped up a false demand, but that it has been upheld by perjured witnesses. Good neighborhood forbids that any such odious discrimination be made, and that, too, in the face of such a record,

Justice requires that the cause be remanded, and a re-hearing ordered.

No. 30.—**MARTHA ASHBURN**, by her next friend, plaintiff in error, **vs. JOHN C. ASHBURN** and **DAVIS GAMAGE**, administrators, &c. defendants.

- [1.] A Court of Equity will not interfere with the due administration of assets in the hands of an executor or administrator, upon slight grounds. To justify such interference, the bill should show good and substantial reasons to fear some probable injury, at least, to the rights and interests of the complainant.
- [2.] An administrator *de bonis non, cum testamento annexo*, has no authority to sell and convey titles to lands not disposed of by the will of his testator.
- [3.] Where the same person is administrator with the will annexed, as to the personalty, and administrator *ad ad hoc*, as to the realty, an order to sell the land should be granted to him, in his latter character, and the advertisement should pursue the order.

In Equity, in Macon Superior Court. Decided by Judge POWERS, May Term, 1854.

The facts of this case are as follows: In 1845, Joseph Edwards of Macon County died, leaving a will in his own handwriting, but not signed or attested, which was admitted to probate, as to the personalty, by the Court of Ordinary. His widow, Mahala Edwards, was the executrix named in the will, and qualified as such. The executrix was directed, by the will, to keep the estate together until the youngest child should arrive at 21 years of age. She accordingly held the estate until her death in 1852; within which time she had paid the debts, and had made purchases of property, real and personal—part of which she had paid for, and for part she was indebted at the time of her death. After her death, John C. Ashburn, who had married Martha, a daughter of Joseph Edwards, procured letters of administration *de bonis non*, with the will annexed, on the estate of said Joseph Edwards, and was proceeding to distribute the same, when his wife, Martha Ashburn, by her next friend, filed her bill alleging the foregoing facts; and that John C. Ashburn was wholly insolvent, and praying that he might be enjoined from distributing the estate, and that provision should be made, out of her portion thereof, for her

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and her children, free from the control or debts of her husband.

The injunction was granted, and the cause was proceeding, when John C. Ashburn was dismissed from the administration, and Davis Gamage was appointed in his room. Gamage likewise procured letters of administration *veterorum*, of the estate of Joseph Edwards; and also, letters of administration of the estate of Mrs. Mahala Edwards.

Gamage proceeded to insert in the newspapers certain advertisements—one, signed by himself as administrator of Mahala Edwards, offering for sale, in the usual manner, and by order of the Court of Ordinary, certain property, consisting of land and negroes and perishable property of the said Mahala Edwards; and another, signed by himself, as administrator *de bonis non*, with the will annexed, of Joseph Edwards, offering for sale, in like manner, by order of the Court of Ordinary, certain land, negroes and perishable property of the said Joseph Edwards.

Mrs. Ashburn then filed her supplemental bill, reciting these additional facts, praying that Gamage, in his several capacities, might be made a party defendant to her former bill, alleging that Mrs. Edwards had no property of her own; that the property advertised for sale, as hers, was really the property of the estate of Joseph Edwards; charging that Gamage, in his capacity of administrator *de bonis non*, with the will annexed, in which capacity he had advertised the sale of Joseph Edwards' property, had no power to sell real estate; praying that Gamage be enjoined from proceeding with either of his proposed sales, and that a settlement and account of the estate be had, which the bill alleged had never been made by Mrs. Edwards or any one else, and that the portion of complainant be set apart, as before prayed, &c.

The injunction was granted as prayed for.

Gamage answered the bill, alleging that the property which he had advertised for sale, as the property of Mrs. Edwards, was truly her property—bought by her since her husband's death, and for which she had given her individual notes, one of

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which he, himself, held. He answered that the mode in which he had signed the advertisement of Joseph Edwards' land, was of no consequence, as he really was also the administrator *ceterorum*, of said estate; and that he and his securities were amply sufficient to respond for any misfeasance in him, in relation to the estate.

On the coming in of the answer, and motion thereupon to dissolve the injunction, complainants' Counsel moved for leave to file an amendment to their bill, the substance of which was, that the individual debts of Mrs. Edwards were more than sufficient to consume the property claimed as her separate property; that she was largely indebted to the estate of her husband; that a portion of the property bought in her own name, was really bought with the funds of the estate, and that her administrator should be decreed to come to a settlement of her account with her husband's estate, and to make good to it her entire indebtedness, in preference to other debts incurred by her.

The Court allowed the amendment, and ordered that the injunction be dissolved, so as to leave defendant, Gamage, at liberty to proceed with his sales, without prejudice to the rights of complainant.

To which decision complainant excepted.

MILLER & HALL; R. P. HALL; WARREN and SCARBORO, for plaintiff in error.

ROBINSON, WARNER and SCARBORO, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We see no reason for reversing the judgment of the Circuit Court. The complainant does not, even in her amended bill, charge or insinuate that the administrator, Davis Gamage and his securities, are not amply able to respond, in damages, for any waste or mismanagement of the estate. And in the absence of any such allegation, we think the Court was

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right in refusing to restrain Mr. Gamage from proceeding with the administration of the estate.

[2.] Had the injunction been dissolved before the time when the property was to have been sold, we are not prepared to say that Chancery might not have interposed to have arrested that sale which was manifestly illegal.

[3.] For it will not be pretended that the administrator of Joseph Edwards, under an order of the Court of Ordinary, and an advertisement, by him, to sell as administrator *de bonis non*, with the will annexed, could have sold and conveyed titles to lands, which were not disposed of by the will. We deem it fortunate for the creditors, therefore, as well as the administrator himself, that the sale was not consummated.

And as these several estates now stand, it is impossible for the Court of Ordinary to adjust them. Resort should be had to a Court of Equity, whose jurisdiction is ample over administrations, situated as this is, to administer full relief, by taking an account between the estates of Mr. and Mrs. Edwards, dividing the property or ordering a sale, by the administrator, of the whole or any portion thereof, at such times and upon such terms as it may direct, and securing to Mrs. Ashburn a suitable settlement, as prayed for by her bill, both out of the estates of her deceased father and her deceased mother also, should any surplus of the latter remain, after settling with her husband's estate and discharging the indebtedness, if any, hanging over her own.

No. 31.—RICHARD A. LANE, plaintiff in error, vs. HENRY HARRIS, defendant in error.

- [1.] Public Statutes, and the facts which they recite or state, must be noticed by the Courts, without their being stated in pleading. And this rule is not in conflict with what was decided in *Dougherty vs. Bethune*, (7 Ga. 90.)
- [2.] The provision of our Statute, "that no person shall be permitted to deny any deed, bond, bill, single or penal note, draft, receipt or order, unless he, she or they shall make affidavit of the truth of such answer, at the time of filing the same", applies only where the execution or *factum* is alleged to be the act of the party filing answer, or adopted by him.
- [3.] Where, under the provisions of a bank charter, it is sought to hold a stockholder liable, who is thereby bound for the ultimate redemption of the bills, by proof of the bank's insolvency: *Held*, that the best and most reasonable rule which can be prescribed for such a case is, that the return of *nulla bona* on an execution, against the assignee of the corporation, should not be considered conclusive against the stockholder, unless due and proper notice be previously given him, that the *ji. fa.* is placed in the Sheriff's hands, with instructions to levy.
- [4.] In an action against a stockholder, who is bound for the ultimate redemption of the bills issued by a bank, "in proportion to the amount of shares, and the value thereof, that each individual or company may hold in said bank, in the same manner as in common actions or debt", when the record does not show that there are any other bills of said bank due and unpaid, or that there has been any other recovery against this stockholder, upon bills of the bank: *Held*, that the bill-holder is entitled to recover the whole sum claimed by him, if it do not exceed the amount of stock owned by the defendant: *Held* also, that should any other action be brought against the same stockholder, on bills of the bank, when he has redeemed bills to the extent of his stock, he may plead such payment, in bar of any further recovery against him.

Debt, in Meriwether Superior Court. Tried before Judge STARKE, February Term, 1854.

This was an action brought by Richard A. Lane, against Henry Harris.

The declaration set out that Harris was a stockholder in the "Planter's & Mechanic's Bank of Columbus", to the amount of one hundred shares of stock, rated at one hundred dollars per share. The charter of the bank provided, "that the per-

sons and property of the stockholders shall be pledged and held bound, in proportion to the number of shares and the value thereof, that each individual or company may hold in said bank, for the ultimate redemption of the bills or notes issued by said bank, in the same manner as in common actions of debt."

The plaintiff alleged that he was the holder of bills of the bank, to the amount of \$1.925, on which he had obtained a judgment against Robert B. Alexander, as assignee, appointed by the Legislature to take charge of and wind up the affairs of the said bank; on which judgment execution had been issued, and return of *nulla bona* thereon by the Sheriff. Plaintiff sought, in this action, to make the defendant, Harris, liable for the payment of such a proportionate part of the debt due him by the bank, as the stock owned by defendant constituted, of the entire capital stock of the bank.

Subsequently, plaintiff filed an amendment to his declaration, stating the same facts, but charging that defendant was liable for the entire amount of the bills held by him—that is, \$1.925, and seeking judgment accordingly.

The defendant filed several pleas, among which was one, that there was real and personal estate, still owned by said bank, on which the *fi. fa.* of plaintiff might be levied, sufficient to pay it off.

At February Term, 1854, the parties having announced themselves ready for trial, and before submitting the cause to the Jury, defendant's Counsel demurred to the amendment to the declaration above stated; and the Court, after argument, pronounced the following judgment:

"The defendant's Counsel having demurred to the amendment to the declaration in this case, filed since the last term of this Court and served on the 24th day of November, 1853, on the ground that the measure of damages and liability, as claimed by said amendment, is not that fixed by the 11th section of the Act incorporating the Planter's and Mechanic's Bank of Columbus, and after hearing the argument of Counsel, *It is ordered*, that said demurrer be sustained, so far as to preclude the plaintiff from

recovering the whole amount of the bills held by him and described in his declaration—it being the opinion of the Court that he only has the right to recover of the defendant, under the pleadings, such a proportion of his bills as the stock of the defendant bears to the whole capital stock of the bank. To which ruling and decision of the Court, the plaintiff's Counsel excepts; it being agreed that the Court should pronounce a judgment, as to the extent of the liability of the stockholders, under the 11th section on this demurrer.

The plaintiff's Counsel then demurred to and moved to strike out all the pleas filed by the defendant, except the first, which is the general issue, and the last, which asserts that defendant never was a stockholder in the "Planter's & Mechanic's Bank of Columbus", and so much of the ninth plea as alleges and sets forth that there has been collected, and in the hands of the assignee, an amount sufficient to pay plaintiff's demand; and after hearing the argument of Counsel and considering the same, the Court sustained said demurrer and motion to the extent made, except as to so much of the ninth plea as alleges and sets forth that the bank is not insolvent, and has real and personal property, to-wit: banking house and lot and other lots, in the City of Columbus, on which plaintiff might have levied his execution, and of sufficient value to pay and satisfy the same. And to that portion of that plea, the demurrer and motion was over-ruled; to which over-ruling and refusal of said motion, as to said portion of said plea, the plaintiff's Counsel excepts.

The plaintiff's Counsel then submitted said cause to the Jury, and offered, in evidence, a number of bank bills purporting to have been issued by said Planter's & Mechanic's Bank of Columbus, of various denominations and dates, and payable to different persons; amounting, in all, to the sum of Nineteen Hundred and Twenty-five Dollars, answering the description of those set forth in the plaintiff's declaration, and of which the following is, in substance, a copy, except as to dates, amounts, letters, numbers and payees, and a portion signed by A. B. Ragan, as Cashier, to-wit:

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A STATE of GEORGIA.

The Planter's & Mechanic's Bank of Columbus, will pay Ten Dollars, on demand, to W. Wright or bearer. Jan'y 9th, 1840.

Columbus, Georgia.

X M. ROBERTSON, Cash'r.

D. McDOUGALD, Pres't.

The defendant objected to said bills going to the Jury, until the plaintiff proved that they were issued by the bank; that is, that said persons, signing and counter-signing said bills, were officers of said bank, as therein represented, and that their signatures were genuine; and also, on the ground that the requisitions of the charter of said bank had been complied with; and after considering said objections, the Court overruled the latter ground of objection and sustained the former. To which ruling of the Court, requiring of the plaintiff the proof of the execution of said bills, plaintiff excepts.

The plaintiff's Counsel then proved, by Hines Holt and John L. Mustian, that the signature of D. McDougald as President, and Matthew Robertson and A. B. Ragan as Cashiers to said bills, were genuine; and that they were the acting President and Cashiers of said bank. Whereupon, said bills were made evidence to the Jury.

The plaintiff's Counsel then offered to read in evidence to the Jury, an exemplification from the Superior Court of Muscogee County, showing the institution, in that Court, by the plaintiff, a suit founded upon and for the recovery of the same bills mentioned in the declaration in this case, returnable to the May Term, 1849, of said Court, against Robert B. Alexander, as assignee of the said Planter's & Mechanic's Bank of Columbus—a judgment against said assignee, for the sum of Nineteen Hundred and Twenty-five Dollars for his principal debt—the sum of Seven Hundred and Seventy Dollars for his interest and for cost of suit, to be levied of the goods and chattels, rights and credits, lands and tenements of said Planter's

& Mechanic's Bank—the issuing of an execution on said judgment, and the return of the same by the Sheriff, with entry of “no property to be found to levy the same”.

The defendant's Counsel objected to the same being read to the Jury, on the ground and for the reason, that there was no allegation in plaintiff's declaration, that the forfeiture of the charter or dissolution of the corporation, and the appointment of Robert B. Alexander assignee of said bank; but on the contrary, the declaration alleges that said bank is yet in existence—which objection was sustained by the Court and the evidence rejected. To which ruling and decision of the Court, plaintiff's Counsel excepts. The plaintiff's Counsel then read to the Jury a certificate, signed by A. B. Ragan as Cashier of said bank, and attested by D. McDougald as President thereof, stating that the defendant was entitled to and held one hundred shares of the capital stock of said bank; and on the introduction of the testimony, plaintiff closed his case. Whereupon, defendant's Counsel moved the Court to non-suit the plaintiff; and after considering the same, the Court sustained the motion and gave the following judgment, to-wit:

“The plaintiff having closed his evidence, and having failed to show any judgment or proceeding against the bank, for the recovery of his said demand, prior to the suit, to infer the ultimate liability of the defendant as a stockholder, and the defendant having moved a non-suit, the Court ordered the same, offering to the plaintiff the right to confess judgment; and appeal or have a verdict against himself”.

To which ruling and decision the plaintiff's Counsel excepts.

DOUGHERTY; E. A. NISBET, for plaintiff in error.

H. WARNER; TOOMBS, for defendant.

The Court not being unanimous, the opinions of the Judges were delivered *seriatim*.

By the Court.—STARVES, J. delivering the opinion.

[1.] The ground of error first assigned in this case, was the

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ruling of the Court, in withholding from the Jury the exemplifications offered by the plaintiff, showing the suit against Robert B. Alexander, assignee, a judgment and execution thereon, &c.

The reason given for this decision of the Court below was, that in the petition there was no allegation that the charter of the Planter's and Mechanic's Bank had been forfeited, and that an assignee had been appointed. And it was insisted for the defendant in error, that though a recital or recognition of both these facts was to be found in the public laws of the State, yet that no party could have the benefit of a public law, without proper pleading.

This latter remark may be very correct: but what is necessary to proper pleading is the question—just the question, here.

It seems to be well settled, that setting forth a public statute, and the facts which it recites, is not necessary to proper pleading. "Public statutes, and the facts which they recite or state, must be noticed by the Courts, without their being stated in pleading." (*Bac. Abr. Stat. L. 2 Wils. 376. Willes, 210. See the reasons of Lord Ellenborough, 4 M. & S. 542. 1 Black Com. 86. 1 Ch. P. 246.*)

This rule is not in conflict with what was decided by this Court, in *Dougherty vs. Bethune*, (7 Ga. R. 90.) There the decision was, that the recital of a fact in a public statute, did not operate to estop a party defendant from denying it by plea, and putting the fact in issue. It was not held, that it was necessary for a plaintiff suing, to set forth such a fact, although it were recited by a public statute; but simply, that the defendant might deny it in his plea, and in this event the plaintiff must prove it. And this Court afterwards says in *Beall vs. Beall* (8 Ga. R. 210,) and in *Thornton vs. Lane* (11 Ga. R. 521) that although such facts may not be conclusive, Courts must "treat them as true, until the contrary appear." The inference from which is, that whilst they remain uncontroverted, as facts stated or recognized by a public statute, the rule of pleading which we have been considering, applies.

The forfeiture of the charter, and the appointment of the

assignee referred to in this case, were facts which fall within this rule, and it was not necessary that they should have been pleaded.

[2.] The question next presented is, whether or not it was necessary for the plaintiff to prove the execution of the bills on which the suit was based, they not having been denied on oath?

It is our opinion, that this provision of our Statute, declaring that "no person shall be permitted to deny any deed, bond, bill, single or penal note, draft, receipt or order, unless he shall make affidavit of the truth of his answer, at the time of his filing it," (*Cobb. Dig.* 486) applies where the execution or *factum* is alleged to be the act of the party filing the answer, or adopted by him. In the case before us, the liability of the stockholder is not placed upon any act of his, in connection with the execution of the bills. If he be liable, he is so, not because by the *factum* he has promised to pay these bills, but because of the fact, that by becoming a stockholder, and subjecting himself to the terms of the Statute in such case made and provided, he has, as it were, guaranteed the payment of the bills. His guarantee is not like that by endorsement; for in that event, it might be said, that he had adopted the *factum*: but he has guaranteed them only, by becoming a stockholder under the provisions of the act of incorporation. For aught that is known to him, or for any thing that he has done, the bills on which this suit was based, may have been all spurious.

Let us take a case which will readily serve as an illustration: A contracts with B by letter, or otherwise in writing, for a sufficient consideration, to guarantee all bills which C may draw on D in favor of B within a specified time, and not exceeding a certain amount. C draws a bill which is accepted, but not paid by D; and B brings suit against A. Now, if the action had been instituted against C and D, the drawer and acceptor, it is very plain that by our Statute they would not be permitted to deny the genuineness of the instrument, save upon oath. But it seems equally plain, that this rule should not apply to A, who knew nothing, and could be supposed to know nothing

of the *factum*; and was responsible only by *collateral* guarantee.

For a similar reason, the execution of the bank bills sued on in this case should have been proven.

[3.] It was also insisted, that the Court below erred in overruling the demurrer of the plaintiff to so much of the ninth plea as alleges and sets forth, that the bank has real and personal estate in the City of Columbus, on which the execution of plaintiff could have been levied, and of sufficient value to satisfy the same.

This raises the question, whether or not the return of *nulla bona* made by the Sheriff on this execution, is conclusive against the stockholder. A question not without considerable difficulty.

On the one hand, it would seem that more should not be required of the bill-holder, than that he should pursue the due and ordinary course of law in exhausting the property of the bank; that this is a reasonable and practical test of his diligence; that any diligence beyond this, should reasonably devolve upon the Sheriff, whom the law appoints to assume such responsibility and exercise such diligence, and who is in a position to do it with advantage; or upon the stockholder who has an ultimate liability, was interested in the issuing of the bills, and may have made gains and profits by them, and who being, as it were, in community of interest with those who issued the bills, and are holding the effects of the corporation, (if there be any) thus possesses facilities which may enable him to discover effects, and have them subjected to the payment of the bills. Something like an analogous rule prevails in other cases, where there is an *ultimate* liability. The return of *nulla bona*, upon an execution issued on a judgment against an administrator for a *devastavit*, is conclusive, as against the sureties, in an action against them on the bond. A return of *non est inventus*, by the Sheriff, upon a *ca. sa.* issued in an action where bail had been taken, is conclusive against the bail, in a suit upon the recognizance.

To this may be added the consideration, that if the stockhol-

der be allowed to take issue on the Sheriff's return, that issue may be determined in his favor, on the ground that the defendant has property which could have been subjected to levy; and when this property is levied on, it may be claimed by another person under our laws; and upon the trial of that issue, the claimant may succeed. The bill-holder is then remediless. But should the case not reach this fatal crisis for him, out of the first issue, (the trial of the question, whether or not the bank does own and possess property subject to the execution,) new and collateral issues may arise, it may even become necessary for a Court of Equity to intervene, and thus this proceeding, to ascertain the bank's insolvency, may become so exceedingly intricate and prolonged as to deprive it very much of practical advantage. And all these issues have to be met and tried by the bill-holder, with the disadvantage, perhaps, of being a stranger to all the parties, and without facilities for procuring information and testimony.

On the other hand, it must be admitted that the stockholder, in this case, was no party to the proceeding against the bank, if he were not cognizant of the suing out of the execution, and the efforts of the Sheriff to find property of that bank; (and if he had been so apprised, he could have pointed out property,) would have no inconsiderable cause of complaint, should he now be concluded by the Sheriff's return. It would seem but reasonable, that he should not be held responsible, unless he had had some notice of the effort to find property; as such notice might have put him upon diligence, and have enabled him to protect himself.

If this stockholder, in reference to this transaction, that is to say the emitting of these bills by the bank, could certainly be regarded as a *privy*, I should doubt the legal necessity of such a notice; but from what I have said on another point, it is evident that I regard him, in his peculiar relation to these bills—a relation created by statute, as a sort of guarantor; by a contract separate from that on which this bill-holder obtained

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his first judgment. As such, notwithstanding his community of interest with the corporation, with reference to these bills, I doubt if he can be said to be in *privity* with it, in the accurate Common Law sense of that term; for which, see *Vsn. Abr. Tit. Privity, Co. Litt. 271, a. 8 Co. 42 b.* And if he be not in the relation of either party or privy, it is not unreasonable to require that he should have such notice.

Even in the case of bail, though their relation to the principal is so intimate a one, I find, that according to the long established practice in England, it was directed that the *ca. ss.* should lie four days in the office, in order to give the bail notice, that the plaintiff had elected to take out execution against the person of the principal, so that they might have the opportunity of rendering his body before the *capias* issued. *Merritt vs. Montfort*, (*Barnes*, 54. 2 *Salk.* 599. *Petersd. on Bail*, 358.) And in the case of a return of *nulla bona*, on an execution issued upon a judgment against an administrator for a *devastavit*, to which reference has just been made by me, may it not be, that in view of the close interest between the principal and his sureties, and the fact that that interest is created by the same instrument or contract, the return is considered conclusive, partly because the judgment is regarded as notice to the sureties, that a *fi. fa.* will be sued out, and the Sheriff put upon the search for property?

In view of all these things, and especially in consideration of the fact, that the peculiar statutory liability of this stockholder places him in a relation to the bank, which is not precisely analogous to that of either party or privy at Common Law, I am willing to unite with my brethren in holding, that the best and most reasonable rule which can be prescribed in such a case is, that the return of *nulla bona* should not be considered conclusive against him, unless due and proper notice be previously given to him, by which he may, if he choose, be put upon diligence in the search for property.

[4.] Lastly: it is insisted, that the Court erred in holding, that the plaintiff was entitled to recover only "such a proportion of his bills, as the stock of the defendant bears to the

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whole capital stock of the bank," and in ordering the amendment by which he sought to recover his whole claim, stricken out.

The effect of this decision was equivalent to the declaration, that the plaintiff, in this case, who brought suit on *nineteen hundred and twenty-five dollars*, of bills, against a stockholder owning *one hundred shares*, out of the *ten thousand shares*, of which the capital stock consisted, (or *ten thousand dollars* of the *one million* of capital stock,) was entitled to recover on the bills held by him and sued upon, only the proportion of *one hundred shares to ten thousand*; that is to say, the *one hundredth* part of his claim, or *nineteen dollars and twenty-five cents*.

The determination of this question turns mainly upon the construction which is to be placed upon the language used by the Legislature in the eleventh section of the Act incorporating this bank, viz: that the persons and property of the stockholders shall be bound for the ultimate redemption of the bills, "in proportion to the amount of shares, and the value thereof, that each individual or company may hold in said bank."

It must be observed, that the language here is not, that the persons and property of the stockholders shall be bound *in the proportion which his shares bear to the whole capital stock of the bank*, but it is, *in proportion to his shares*. The proportion stated, is not a comparative relation of *his shares to the capital stock*, but such a relation of *his liability to the number and value of his shares*. He shall be liable, says the charter, in proportion to what he owns of the stock. Nor does the act of incorporation say, that the stockholder shall be bound for the ultimate redemption of the bills to *each* bill-holder "in the proportion his shares bear to the whole stock," which is the effect of the construction in the Court below, but it simply asserts a general liability for the redemption of the bills, (that is *all* the bills,) in proportion to the amount of his stock. It is very plain, therefore, that the proposition stated by the Court below, in the use of the words "which his stock bears to the whole capital stock," is an interpolation on the Statute.

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But it is urged that it is necessary to give this construction to this provision of the charter, in order to avoid substituting an injustice for a difficulty. Let us see what is the true value of this assertion. If it be correct, then, of course, the method or mode of proceeding which this construction requires the bill-holder to adopt, in enforcing payment of his bills, is that which is equitable, practicable and just. We will put it to the test.

The Act incorporating the Georgia Rail-road & Banking Company contains a provision similar to that under consideration, making the persons and property of the stock-holders liable for the ultimate redemption of the bills. And no one will question, that the Legislature intended that this provision should have the same signification and effect in both charters, and in all the charters of banks in our State, where it may be found. Now the capital stock of the institution I have just mentioned, is upwards of four millions of dollars; there are some seven hundred stockholders, at present, and it is possible there might be as many stockholders as shares; that is to say, more than forty thousand. For many years, this bank has had a circulation of near one million of dollars. If it were to become insolvent, what would be the consequence? By the provisions of the charter, these numerous bill-holders have, or were intended to have, a remedy against the stockholder, for the payment of their bills, "as in common actions of debt"; and according to the construction which prevailed in the Court below, (and which is insisted on as that only which is just,) in order to have the benefit of this provision secured by the Act, each of these bill-holders would be compelled to institute suit against at least seven hundred, possibly forty thousand stockholders. This would be hard enough—perhaps impracticable and out of the question, even if the bill-holder happened to possess some hundreds or thousands, in bills of the bank. But let us suppose that he had only a small amount (he might have but five dollars, or even one dollar) of these bills. In reason, justice, and according to law, he would be as much entitled to have payment for that, as for thousands. It might, indeed,

the *all* of the widow or the orphan. In order, however, to *ve* the benefit of the rights which the charter secures, that bill-holder not being able, according to law, to join these several promissors in one action, would be constrained to institute at least seven hundred suits for the recovery of that small amount of money. If he attempted to do this, it is altogether probable, that out of seven hundred defendants, some would be found bankrupt or out of the jurisdiction of the State, and be inaccessible by the ordinary process of law; and almost certain, that by some one or more of the many casualties and contingencies which cluster around every action at law, and against which the most astute and provident Counsel cannot always provide, he would lose one or more of these suits. And is it not absolutely certain, that the prospect of these results, and the amount of Counsel's fees, for cases lost and won, which he would have to pay, would operate as a prohibition to his bringing such suits or having the benefit which the charter intended to secure for him?

Let it not be said, that he could part with his bills to some one having more of them, and who could afford to sue, for this is as much as to say, that he could *sell them at a sacrifice*. It would not be believed, for a moment, that in legislating so important a provision, for the benefit and protection of bill-holders, the General Assembly of our State intended to make such a sacrifice necessary to the poor man or the small bill-holder. That body certainly designed to put every citizen upon the same footing of reason and justice, and to supply a ready and efficacious remedy to each and all.

The illustration thus presented, serves strongly to show the *illowness* of that boasted justice attributed to the construction attended for by the defendant in error, of that provision which we have been considering.

I cannot consent to impute such a scheme to the legislative mind, and turn from it, to some more just method of enforcing this provision of the charter.

So far as the rights of bill-holders are concerned, it would be better, if what the stockholder is liable to pay, could be dis-

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tributed among all the bill-holders. And this would be the direction given to it, if it were paid into a Court of Chancery, to be disposed of upon equitable principles. But this is rather a matter of interest to the bill-holders than to the stockholders. It does not operate any greater hardship on the stockholder, if he pay to one bill-holder, than if he pay to all the bill-holders, provided he be protected in making such payment against any farther recovery. If he is liable, it is right that he should pay to some one; and the Legislature, in its sovereign discretion, has said that he shall be made to pay (if he will not without suit) by an action at Common Law, and not in Equity, unless the bill-holder desire it; that he shall be held liable, "as in common actions of debt." He cannot be so held liable, practically, and this provision of the Legislature is effectually defeated and set at naught, as I have shown, if payment can be enforced only in the way made necessary by the construction I have been opposing: There is no other method by which payment can be coerced, "as in common actions of debt," except that which permits and authorizes a recovery for the whole amount of the claim from any stockholder whose shares are sufficient to meet the payment. The bill-holder can thus recover his claim, and have the full benefit which this provision of the Statute was intended to secure to him.

This construction gives effect to the Statute, and carries the obvious intention of the Legislature into effect, by supplying every bill-holder with a speedy and efficacious remedy. In order, therefore, to give complete effect to this provision of the charter, creating a statutory liability, if there were no analogy at Common Law, it would be necessary to adopt a construction which holds, that the stockholder became liable to pay every, or any of the bills to the extent of his stock; that he guaranteed each so far as the extent of his stock, and not a portion of each bill, sufficient, in the aggregate, to make up the amount of his stock; and that this liability ceases when an amount has been recovered from him, equal to the value of his stock; and such recovery he can plead in bar of any other action against him by a bill-holder. This construction interpolates nothing on the

Statute, and does no violence to its terms; but on the contrary, is in harmony with the simple and ordinary signification of the words employed.

I can conceive that another construction might be placed upon the words, "shall be pledged and bound, in proportion to the amount of shares and the value thereof, that each individual or company may hold," &c., if the question were presented, as to the extent of the stockholder's total liability, with reference to the whole circulation of the bank. If, at the time of the dissolution, or perhaps at the time of the suit's commencement, (should the assignee have redeemed some of the bills after the dissolution,) the whole amount of bills was greater or less than the whole amount of the stock, the liability of the stockholder would be on all of them; and it would seem not unreasonable, that in such case, it should be in proportion to his stock. If the circulation exceeded the capital stock, then his liability would transcend his stock, in the proportion which that stock bore to the whole capital stock of the bank. If the circulation was less than the capital stock, then his liability would be less, in a similar proportion. For example: if the circulation had been *one million one hundred thousand*, at the time specified, this stockholder's liability being *one per cent*, or as *one hundred* shares is to *ten thousand*, he would be liable to pay *eleven thousand* dollars of the bills. But if the circulation was only *nine hundred thousand*, then he would be liable to pay only *nine thousand* dollars of the bills. The recovery, however, in a particular case, would not be of a certain per cent. on each bill sued upon by a bill holder, according to the construction which I have been opposing, but would be for the whole amount of the bill-holder's claim, provided it did not exceed the proportion of the stockholder's liability.

It is possible that the terms of the charter, which we are considering, may have been employed, in part, at least, in the sense which I have just expressed. But it is unnecessary to decide this question, as it is not presented by this record. There is before us no evidence, as to the amount of bills in circulation at any time, and no evidence that there is, now, any

other bill-holder of this bank, besides him who is now before the Court. For anything that appears in this record, all the other bills may have been paid by the effects of the bank. On such a record, I cannot, for a moment, doubt that the plaintiff is entitled to recover the whole of his claim against the defendant in error.

The construction which I place upon this statutory liability of the stockholder, has its analogies in other liabilities at law. An example may be found in the liability of sureties upon a Sheriff's bond. Although many persons be injured by the misconduct of the Sheriff, if one vigilant suitor exhaust the penalty of the bond, no further recovery can be had thereon, against the sureties, by any other person. But I will put a case still more to the point. We will suppose, that on the same day, for a similar consideration, and payable at the same time, A gives his promissory notes, payable to bearer in different sums, amounting, in all, to twenty thousand dollars, to twenty payees. Desirous of using these notes in some common transaction, these persons, by a separate instrument, in writing, agree to guarantee the notes, each severally binding himself for the payment of the whole, in proportion to the amount of the note received by him from A provided A should, himself, be unable to pay. The notes are then transferred and assigned to other persons, upon the faith of this guarantee. Sometime after they have become due and payable, C a holder of one amounting to one hundred dollars, brings his action thereon, and upon the guarantee against B a guarantor, and one of the original payees of a note, amounting to one thousand dollars, proves the insolvency of A in the proper way, and demands a judgment against B. Now, if he had sued in Equity, or if the holders of the other nineteen notes had filed their bill and taken him there, and had shown that their notes were unpaid, then, perhaps, he could have recovered from B, only such proportion of his claim as B's note bore to the whole amount; that is to say, the one-twentieth part thereof. But C is not taken into Equity, we will suppose, and no objection is made by the other note-holders, to his recovery—they may have been

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all paid by A's property, for anything that appears in the proceeding. Can there be any doubt, for a moment, of C's right to recover his whole claim from B?

It would not be difficult to find other analogies; but the length to which this opinion has already reached, admonishes me to forbear.

Let the judgment be reversed.

LUMPKIN, J. concurring.

The Court being of one mind, as to the first three grounds of alleged error, I shall address myself to the fourth only—which is, that the presiding Judge held that the plaintiff could recover such proportion of his bills only, as the stock owned by the defendant bears to the whole capital stock of the bank.

Now, the counter proposition to this and that which I hold to be true, is, that the plaintiff is entitled to recover the whole amount of his bills out of the defendant, provided the number of his shares and the value thereof, estimated at \$100 per share, is equal to the amount of the bills sued on. And there being a diversity of opinion among the members of the Court, upon this point, I shall proceed to state the reasons, as it is made my duty to do, in support of the view which I entertain.

This action is brought on the XIth section of the charter of the Planter's & Mechanic's Bank of Columbus, which is in these words: "the persons and property of the stockholders shall be pledged and held bound, in proportion to the amount of shares and the value thereof, that each individual or company may hold in said bank, for the ultimate redemption of the bills or notes issued by said bank, in the same manner as in common actions of debt; and no stockholder shall be re-

liaved from such liability, by sale of his stock, until he shall have caused to be given sixty day's notice, in some public gazette of this State". (*Prince's Digest*, 127.)

The case must be decided, of course, upon the proper construction of this clause in the charter, the phraseology of which is not so explicit, perhaps, as it might have been.

The following positions, I believe, are not denied or doubted in any quarter; at least, they are too well established to be successfully controverted: That under this and similar provisions, in bank and other charters, the liability of the stockholders is several, not joint; that inasmuch as the measure of this statutory liability may be wholly different in each case, depending upon the number of shares held respectively by the stockholders, a joint suit, at Law, would be impracticable, as there could be no joint judgment; that the Act does not intend that the stockholders should be sureties for each other—each being severally responsible for the amount of his own stock, and no further. Some of the stockholders may have removed beyond the jurisdiction of the Court, so as not to be reached by its process, or affected by its judgment: or have become insolvent; still, under this section, those who are liable and solvent, cannot be made to pay more than they otherwise would, on that account. That the remedy provided by the XIth section of the charter, is not only essentially, but *exclusively* a *Law* remedy; the liability, whatever it is, is to be enforced "in the same manner as in common actions of debt". That if the redress at Law should prove to be inadequate, from any cause whatever, the Superior Court, sitting in Equity, will take jurisdiction over a bill filed by one or more of the creditors, in behalf of himself and others, against all the stockholders who are solvent and suable, concurrently with a Court of Law, over separate actions, against each of them, upon his sole and separate liability. That in Equity, the rights of all concerned, on both sides, might be considered at once. It might be considered how much was due in the whole and to all those who should choose to adopt this remedy; and a decree might go against each for his share of the liability; that it is the privilege of

the bill-holder to elect his forum; he may go into Chancery, but he cannot be compelled to go there; that the Equity jurisdiction in such case, is not derived from the Statute, but is deducible from the acknowledged powers of a Court of Chancery.

The question then, at issue, is narrowed down to a single point; in a separate suit at Law, by action of debt, at the instance of a bill-holder against a stockholder, shall the plaintiff be entitled to recover the whole of his bills, if they do not exceed the amount of the defendant's stock, or shall he recover a ratable portion only; that is, as the stock owned by the defendant bears to the whole capital stock of the bank?

According to the construction heretofore put by this Court, upon this Act, while it was designed to create a personal liability on the part of the stockholders, it, at the same time, limits that liability. Had the section under which this suit is brought read, "the persons and property of the stockholders shall be pledged and bound for the ultimate redemption of the bills or notes issued by the bank", the only construction of such a provision could have been, that the stockholders were liable in their natural capacities, as partners, for the whole amount of the unpaid bills or notes, whatever that amount might be. But the insertion of the intermediate words, that they are to be bound "in proportion to the amount of shares, and value thereof, held by each", curtails the general liability, and prescribes, in the first place, not only personal and several liability—but, secondly, so restricts it that no stockholder can be made responsible, in any event, beyond the proportion which the number of shares held by him, bears to the whole number into which the capital stock of 10,000 shares is divided.

If this, then, be the true meaning of this section, and in my judgment it is all that it proposes to effect, it follows, of course, that the creditor, in his action at Law, *may* recover the *whole* of his debt, and not a *proportion* of it only. At any rate, this will be regulated by general principles, uncontrolled by the Statute.

The policy of the Legislature in making this provision, which is a condition, in most, if not all the charters granted about this time, was to secure a sound currency to the country: and as one of the means of accomplishing this object, they intended to give to every bill-holder a simple, direct and available remedy *at Law*, for coercing the stockholders to redeem the circulation of the bank.

Were the words of the Act ambiguous, and its grammatical structure doubtful, such exposition should be given to this section, as would best harmonize with its design. And every fair and reasonable intendment ought to be made, to effectuate the intention of the makers of the law, *pro bono publico*. (*Heyden's Case*, 3 Rep. 7. *Plewden's Commentaries*, 1057, b. *Rex vs. The Eastern Counties Railway Company*, 2 Q. B. Rep. 347. *Williams vs. Pritchard*, 4 T. R. 2. *Lyde vs. Bernard, M. & W.* 113. *Pierce vs. Hopper*, Str. 253. *New River Company vs. Graves*, 2 Vernon, 431.)

Indeed, these and numerous other authorities, ancient and modern, which might be cited, go quite beyond the foregoing well settled rule of construction, and maintain that the words of a Statute may be construed in a sense different from their ordinary meaning, when the Act is designed to remedy some existing or threatened mischief. But I am not, and never have been, the advocate of an enlarged interpretation of Statutes or Constitutions. In the words of Mr. Justice *Cole-ridge*, "I would never mould the language, in order to meet either an alleged convenience or an alleged equity"; and, I will add, or an alleged public policy. And if I felt that the construction which I am endeavoring to uphold, put any force on the meaning of the Act, I should refuse my concurrence, without the clearest and most indisputable evidence of legislative intent. But when the XIth section of this charter declares that the stockholders shall be bound in proportion, it does not say, to the *number* even, but to the *amount* of shares, and the value thereof, they may severally hold, and that, too, as in common actions of debt, is there any straining of language to insist that they are respectively bound, according to the amount

or extent of their stock, especially if this construction, while it imposes no additional burden upon the stockholder, will greatly add to the security of the creditors of the banks and other corporations, by making their remedy over more cheap and easy?

What was the case of *Coulter et al. vs. Robertson*, (2 *Cushman*, 278,) that has been commended, so earnestly to the favorable consideration of this Court? A trustee of a dissolved bank was appointed by Statute, to sue for and collect money sufficient to pay all the debts of the bank. And what was the result of the judgment of the Mississippi Court, in that case? Why, that the trustee might select the particular debtors to the corporation, that he would sue first; and that these had to pay, "to the uttermost farthing," what they owed the corporation, while all the rest went free—and this among debtors standing as these stockholders do—precisely upon the same footing. Equality of *burdens* was certainly wholly overlooked or disregarded, in this decision.

But suppose we have been wrong, heretofore, I maintain that the next most consistent and rational construction of which the words of the Act are susceptible, is this: That instead of the aggregate liability of the stockholders being limited to \$1,000,000 only, the amount of the capital stock, they are bound for the ultimate redemption of *all* the unpaid bills issued by the bank, be it one million or any other sum. And I confess there is much reason in favor of this interpretation of the charter. It is true that the charter declares, that the stock of the company shall consist of \$1,000,000, to be divided in shares of \$100 each. But the capital is not expressly limited to that sum. It does not even say, as is usual in monied charters, that the capital shall *not exceed* or *be more than* one million. The convenience of the intended stockholders, as well as notice to the public, required that the amount of the company's funds should be fixed. But in this case, not only is there a departure from the common practice, in this respect, but by another fundamental rule of the corporation, they are allowed to contract debts by bond, bill, note or other security,

to three times the amount of the capital stock actually paid in, over and above the amount of specie actually deposited in the vaults of the bank, for safe keeping.

Suppose that instead of \$1,000,000, the unpaid circulation, upon the failure of the bank, had amounted to \$3,000,000, may not the Legislature have intended that the stockholders should be personally bound for the eventual payment of the whole of this sum? The corporation was authorized, under certain circumstances, to create this amount of indebtedness; and the presumption is, that it was done for the benefit of the corporators. But whether this be so or not, the liability would have been incurred by the duly appointed agents of the company; and if a total loss ensued, even to the extent of absorbing both profits and capital, ought third persons to suffer?

If this be the true exposition of this individual liability section—the clause under consideration means this—that the stockholders shall be personally and severally responsible for the ultimate redemption of all the unpaid bills and notes of the bank, be the same more or less, at least up to three millions.

But the question recurs, how liable? Still, not as unincorporated persons, but in terms of the charter, in proportion to the amount of shares held by each, and the value thereof, viz: if the circulation to be taken up amount to \$200,000, and the defendant, Mr. Harris, owns 100 shares, he is liable for \$2,000. If the unredeemed circulation be \$1,000,000, he is bound for \$10,000: if \$3,000,000, for \$30,000. This construction makes the measure of each stockholder's interest and right to dividends, the measure, also, of his responsibility. And thus forecloses the question of contribution, as between the stockholders, themselves, because no one of them can be compelled, under any circumstances, to pay more than his proportion of the whole debt. And in this way, all real or apparent hardship is avoided.

I concede that the true constructive effect of this clause is not clear, beyond a doubt. And as I grow in years, at least, if not in wisdom, I have learnt to repose less confidence in my own, as well as in the opinion of others, however *authorita-*

freely expressed. And in this instance, I am not prepared to say, with certainty, that the latter view taken of this charter, though at variance with the opinion heretofore intimated by this Court, may not be a sound one. Moreover, it has, to my mind, this additional recommendation—that it approximates more nearly to what the law of corporations ought to be, namely: that these artificial bodies, when created, should occupy precisely the same situation, as to the capacity of contracting, as natural persons; and that just so soon as the stockholders, in their character as corporators, become irresponsible, take away the shield interposed by the Act of incorporation, and leave them liable, in their private capacity, for their contracts, as if no charter had been granted.

That the same individuals should be permitted to repudiate debts which they have contracted as corporators, is contrary to all the inflexible rules of law and justice, as applied to every other business transaction of life. The Legislature has already, by the Acts of 1843 and 1845, adopted this principle and made it applicable to all corporations, except banks and insurance companies. (*Cobb's Digest*, 542-3.) And I am content, therefore, to administer the law as I find it settled by the sages of the science who have gone before me, “whose shoe's latchet I am not worthy to unloose”.

Either of the two views which I have undertaken to present of this question, stand equally opposed to the idea of a ratable liability upon each bill. For in the last light in which it has been contemplated, it would only be incumbent on the plaintiff to show that the proportional liability of the defendant, upon his hundred shares, for the outstanding bills, was sufficient to cover his demand; and he would be entitled, as under the first view taken of the Act, to a recovery for the whole amount of his claim. I thus yield what might, perhaps, admit of debate, to-wit: that the onus would be upon the plaintiff, to prove the amount of the unredeemed circulation. And this he could do by resorting to the books of the bank—its published reports, and by such other testimony as he might have it in his power to procure.

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But if there be any thing in the XIth section to warrant the construction put upon it by his Honor, the Circuit Judge, I must say, with undissembled respect for the legal acumen of my learned brother, I have not been able, after the most careful and critical examination, to discover it. Of one thing I am entirely sure—give to the charter this interpretation, and it ceases to afford, not only adequate protection, but any practical, working remedy, whatever, to the thousands of bill-holders scattered over the State, against the numerous stock-holders of this broken and defunct corporation.

It is, indeed and in truth, as was “forcefully” urged in the finished argument of Mr. Nisbet, a practical denial of the benefits of the Statute, and an utter repudiation of the legislative policy. Let this ratable liability doctrine obtain, and these personal and individual liability clauses, which have been introduced into our modern charters, will become a dead letter. To hold that every man who is unfortunately the owner of a five dollar bill of one of these insolvent corporations, shall either sacrifice it at a forced sale of ten cents in the dollar, or some other nominal sum, or institute a hundred suits at law, to get his money, or file his bill, bringing all the bill-holders and all the stockholders before the Court, at a cost of fifty times the amount of his claim, is to contravene and render nugatory this most wise and beneficent policy of the Legislature.

In *Russell et al. vs. The Men dwelling in the County of Devon* (2 D. & E. 667) where the question was, whether an action would lie against the inhabitants of a county, for an injury sustained by an individual, in consequence of one of the public bridges being out of repair, Mr. Justice Ashurst said, “if separate actions have to be brought against each individual of the county for his proportion of the damages, it is better that the plaintiff should be without remedy”—and so we say here.

But it is said that the mischiefs to be apprehended from this decision of Judge *Starke*, are too highly colored. It is suggested that the stockholders will, in most cases, upon the mere presentation of each bill, promptly pay their respective quotas; and that recourse need not be had to the Courts to compel

them to account for their share of the debt. I must say, the experience of the past negatives this assumption. And let it be remembered, that any exposition of the charter, based upon this hypothesis, is necessarily fallacious, inasmuch as the XIth section was inserted in the Act, upon the supposition that voluntary payment would be refused. And it provides a remedy by suit, in direct reference to this contingency. The stockholders are to be forced—not coaxed to respond, “in the same manner as in common actions of debt”. This clause evidently looks to forcible, and not peaceable redress. It is a war measure.

However the fact may be, therefore, the section must be construed as intended to supply a coercive proceeding—and we must, of course, spell out the meaning and will of the Legislature, in that aspect of the Statute.

But were it otherwise, the inconvenience to the small bill-holders (and nine-tenths are of this description) of seeking satisfaction in this way, even could they succeed, by getting a modicum contributed by each stockholder, on whom they might successively call, would be little less than would be incurred by every bill-holder dragging every stock-holder to Court, to collect out of him his ratable proportion.

It may be contended, that this is the only sort of liability which takes an equitable view of the rights of all the bill-holders, as well as the liability of all the stockholders. That the former have equal rights as creditors, to demand and receive payment of the latter, and that to allow one or more to collect the whole of their money out of one or more of the solvent stockholders, by means whereof a portion of the rest may be entirely excluded, is unjust, and consequently, ought not to be sanctioned. This objection, so far as it in reality exists, arises not from any defect in the law, but from the imperfection of all human institutions. Each stockholder owes to a bill-holder the amount of the value of his shares. It is a statutory debt, *quasi ex contractu*. The bill-holders are in the position of a number of creditors of a common debtor, who is bound only to pay a given amount. They stand primarily equal in their right.

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Any one or more may be *bona fide* preferred and paid. And in this case, as in all others of like character, he who is vigilant, and sues and gets judgment, acquires precedence under the law. And this does no wrong to any body. This is a familiar principle, and one which is constantly recognized and enforced in all the Courts. Thus, in *McDermutt vs. Strong*, (4 John. Ch. Rep. 691) it was said by the Chancellor, "though it was the favorite policy of the Court to distribute the assets among creditors *pari passu*, yet where a preference had been established by the superior legal diligence of any creditor, that preference should be observed in the distribution".

So in *Corning vs. White*, (2 Paige 567) it was held that the filing of a creditor's bill, gave to the vigilant creditor the right to priority; and that there was nothing in the principle of equal distribution among all the creditors, *pro rata*, which has been considered powerful enough to set aside the priority already acquired by a vigilant creditor. *Hubbard et al. vs. Hamilton Bank* (7 Metcalf's R. 340.)

Favored as *rent* is in England, a landlord could not there, until the Statute of *Ann*, destrain goods taken under execution; and which were, as it is called, *in custody of the law*. That Act gave him a remedy for one year's rent, but no more. The industrious creditor seized and appropriated the rest. Is not the whole doctrine of the Statute of Limitations founded upon the maxim, *vigilantibus non dormientibus jura subveniunt*? The law regards those who watch, and not those who sleep—the law is only for the protection of those who use diligence to protect themselves. In popular actions to recover penalties, the right to which is given to *all* the people in common, he who brings his suit, and can obtain the first judgment, secures a title, to the exclusion of every body else.

A most striking illustration of this principle is to be found in the law, prescribing the order in which the debts of an insolvent testator or intestate are to be paid, by the executor or administrator. The Statute directs, peremptorily, that the legal representative shall pay first, funeral and other expenses of the last sickness, and so on. Besides, it is well settled that

no creditor, by obtaining judgment, elevates his demand in the scale of priority. And yet, in the face of all this, a creditor of inferior dignity, by suing at law, and obtaining judgment, may exhaust the whole of the assets of the estate, to the exclusion of claims of a superior grade. True, the representative may make himself personally responsible, by not pleading these outstanding debts, provided he have notice of them. But he may be utterly insolvent; and whether this be so or not, the conclusion to be drawn in favor of the doctrine involved in this discussion, is equally pertinent. Indeed, in England, the rule is, that among debts of equal degree, the creditor who gets a judgment, is allowed a preference; and the reason assigned is, "because the executor ought to pay that creditor first, who uses the first diligence." (2 Wms. Ex'rs, 258.)

So in *Ashley vs. Pocock*, (3 Atkins. 209) Lord Hardwicke said, "Suppose two creditors at large of the first testator, Barnsley, and one brings a bill before the other, and obtains a final decree and a report of the master, and that report has been confirmed; and then the other brings a bill, and obtains a final decree, and his demand is affirmed, to be sure the executor ought to have paid the first who used the first diligence. So in case of an action at law, the creditor who obtains the first judgment, should be preferred".

The very motto of the law is, "the race is to the swift." Why the priority given by law to first judgments, first attachments, first deeds, first mortgages, the first entry of public lands—the first every thing? The universal response is, *non leges vigilantibus, non dormientibus subveniunt*. Even the miller's rule is, "first come, first served", which is a strong, though homely translation of this fundamental maxim. It was recognized and enforced by this Court, in the case of a Sheriff's bond. *Bothwell vs. Sheffield*, (8 Ga. Rep. 569.)

The Sheriff of Dooly County had given his bond, in terms of the law, in the sum of \$5000. It was to indemnify all persons aggrieved by the official misconduct of himself and his deputies. Moneys were collected by them on executions, far exceeding in amount the penalty of the bond, and which they failed to

pay over. Suits were commenced, and others threatened, by the plaintiffs in *fi. fa.* for an amount much larger than the penalty of the bond. And the securities filed their bill, and prayed the Court so to direct the judgments to be recovered, that the creditors first entitled should be satisfied to the extent of their obligation; and that they might be restrained from further prosecuting their suits.

On the demurrer, the Court below dismissed the bill, upon the ground that the complainants had a complete Common Law remedy. And this Court affirmed the judgment, and held that whenever, by previous recovery, the penalty of the Sheriff's bond has been exhausted, the sureties may, even at law, plead this fact and protect themselves from further liability—and this being the case, it would be unjust to more vigilant suitors, who had been injured by the official misconduct of the Sheriff, to restrain them from prosecuting their rights at law.

We say of a case *currit quartuor pedibus*, or that it goes upon all fours, when it is exactly similar in its circumstances to the case in support of which it is quoted, or when it is exactly in point. *Bothwell vs. Sheffield* is all that and more. For in this case, every one of the execution creditors whose money was collected and withheld, was equally entitled to participate in the security, provided by the Sheriff's bond, as was every other person aggrieved by the misconduct of that officer, whether a judgment creditor or not. And yet a Court of Chancery refused to entertain an injunction upon the application of the securities, to restrain the creditors who had first sued, upon the ground, that the liability of the securities was limited by their bond; and that they might protect themselves by a plea to that effect, as well at Law as in Equity. And that this being so, the *vigilantibus* doctrine should not be disturbed.

I have said that this case covers the one at bar, and that it does more; and it is true in this, namely; that the creditors of the Sheriff have but a single fund to which they can look: whereas, in the case before us, every other stockholder besides the ones sued, is also liable to every other bill-holder for the amount of his shares. And unless some of them are bankrupt,

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or have left the State, the recoveries, as well as the rights or liabilities would be pretty much equalized. And he may very well imagine that this was in the eye of the Legislature, in providing this remedy—that each bill-holder might look for payment to some stockholder who was in his neighborhood.

Had all the bill-holders severally sued the corporation before its dissolution, would not the first judgments have been first satisfied? And yet all could not have been paid had the corporate property been limited in value. And this would have been a parallel case to that of the Sheriff's bond, why should a different rule prevail, when proceedings are instituted against the corporators to charge them personally, instead of against the corporation? a rule which is contrary to all the analogies of the law, and in conflict with the maxim and motto to which I have referred; and which are indelibly inscribed over the door-way of every Court-house? It is certainly not for the benefit of the bill-holder, whatever other interest it may subserve.

I am sufficiently conscious that the opinion in *Bothwell and Sheffield* is more than questioned by the decision of Judge STARKE. It is virtually over-ruled, and with it, in effect, though unintentionally, of course, the Act of the General Assembly, passed in 1847, and approved December 30th of that year. (*Cobb* 502.) For, on examination, it will be found that the opinion of this Court is in literal conformity to the provisions of that Act. Indeed, it was based upon it, and was so understood by the author of the New Digest, as will be seen by his marginal reference. And although that Statute was passed for a different purpose, it is nevertheless a plain and palpable legislative recognition of an old Common Law principle.

This Act is directory of the mode of entering up judgment on official or voluntary bonds.

And it not only repeals the rule as laid down by this Court, in *Stephens and others vs. Crawford, Gov.* (3 *Kelly's Rep.* 499) that there can be but one recovery on a bond at Common Law, but it affirms, by clear and irresistible implication, the doctrine that, primarily, all persons injured by the misconduct

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of the Sheriff, have an equal right to demand and have indemnity out of his official bond: but that those who sue and obtain the first judgments, are to be first satisfied, until the whole penalty of the bond is exhausted; and that then these previous recoveries may be pleaded in bar of all subsequent suits.

While this *Statute* stands in the Book, it is in vain to talk of the unreasonableness of the *rule* about to be established in these bank cases. Both are in strict accordance with the whole logic of the law; and are, I had almost said, indissolubly interwoven with the whole frame-work and superstructure of the science.

When the inquiry is made then, who is the promisee, under this *quasi* contract, and which bill-holder shall have the preference? shall he who is sharpest and who has outstripped the rest in the race, receive payment, while others who are more modest, though equally, if not more meritorious, are postponed? we answer, should even this result follow, which can hardly be anticipated, "so the law is written".

The State, in permitting a paper currency, has evinced great care to prevent any injury or loss to the people. It has adopted this measure, amongst others, for this purpose. No legislation can absolutely protect the community against the possibility of loss, because no legislation can, as was said by the Court in another case, "make the directors of all the banks equally skilful and prudent—all their officers honest and all their debtors solvent". Still, in construing these Acts, we should steadily keep in sight the end for which they were passed. And in case of doubt, that interpretation should be preferred which, while it saves a multiplicity of suits and consequent accumulation of costs, will, at the same time, afford the best safeguard against the evils of adventurous banking. Acting under proper restrictions, and honestly and faithfully performing the duties assigned them by their charters, these monied institutions will always prove valuable instruments of public utility and convenience. But relax these legislative checks, and the grossest management, not to use any harsher terms, must and will be the natural and inevitable consequence.

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Before quitting this case, I am constrained to say, that upon further reflection, I am not content with the assent which I gave to one point in the judgment; and that is, as to the effect of the return of *nulla bona* made by the Sheriff of Muscogee County, on the execution against the bank or its assignee. It was held to be *prima facie* evidence only, of insolvency, in this action against the stockholder.

I am not satisfied that the return of the Sheriff can be controverted in this suit, especially as the return was made in the county, where the bank was located, and where, it is reasonable to suppose, it had property subject to the *fi. fa.* if any where. No case was adduced to authorize it. *Goodall vs. Stuart*, (2 *Hen. & Mang.* 105,) is a precedent directly against it. And I find it very difficult to answer, satisfactorily to my own mind, the reasoning upon which that decision was made. Such a practice would be attended with difficulties which would seem to be almost insuperable. Besides, the general principle is indisputable, that a return by the Sheriff is conclusive between the parties, and can be impeached only in an action against the officer, for a false return. It required a special Statute to authorize the *impromptu* answers made by Sheriffs, to rules and orders taken *even against him*, to be traversed. (*Cobb*, 579.)

And suppose it be true, that there are assets belonging to the bank, as the plea alleges, these very assets belong to and are the property of the stockholders, which distinguishes this case from that of principal and security, to which it has been likened. But I forbear to discuss this assignment.

BENNING, J. dissenting.

When this case was called up, Mr. Dougherty, one of ^{the} Counsel for the plaintiff, objected to my presiding in it on ~~the~~ ^{three} grounds—First. That a case or cases like this was pending in the Superior Court of Muscogee County, in favor of the plaintiff in this case, against Mrs. McDougald, as the executrix of Daniel McDougald, deceased, and that at the time of my being elected a Judge of this Court, I was of Counsel for her in the case or cases.

Secondly. That cases like this were pending in that Court in favor of other persons than this plaintiff, against Col. Seaborn Jones, as a stockholder in another bank—the Chattahoochee Rail-road & Banking Company, and that Col. Jones was my father-in-law, and had been, at the time of my election as Judge, my client in those cases.

Thirdly. That the Counsel for the defence, in each of the cases commonly called the “bank cases,” to which cases belonged this, had agreed, among themselves, to make, or had made “common cause” in the defence of all the bank cases; and so, that all of those Counsel were to be considered as substantially engaged in the defence of each and every one of the cases; that, consequently, I was to be considered as having been, at the time of my election, substantially one of the Counsel for the defendant in this very case.

These grounds I did not think sufficient to support the objection, and therefore, notwithstanding the objection, I presided in the case. Was I right in this? That I was, I will state my reasons for thinking.

First, then, as to the third ground. That ground, as far as it concerns me, has no foundation, in fact. I never made any agreement with any body, to make common cause in the defence of the bank cases, generally, or of this case, in particular. I never took part in the defence of the cases generally, or in the defence of this.

As to the other two grounds, I shall admit them to be sub-

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tantially true, although I might say, if I pleased to say it, that Col. Jones, as to all the cases of any consequence against himself, viz: those in favor of the Bank of Columbus, has defences different from any which this defendant, Harris, appears to have, or, as I think can have, and that in my opinion these special defences are, of themselves, for him, sufficient.

I take this to be a true principle of law—that it is the duty of a Judge to preside in all cases in which he has had given him authority to preside. This principle, it seems to me, necessarily results from the relation of principal and agent—that relation in which the State and a Judge stand toward each other. The State delegates to a citizen authority to decide cases. Why? I can conceive of no reason why, except that the State wishes him to decide the cases. As to the purpose of the State, as the delegation of the authority to him, there are but three things that occur to me as supposable—one, that the State wished the authority to be used—one, that the State wished the authority not to be used—one, that the State was indifferent whether the authority should be used or not. To say that the State wished the authority not to be used, is to say that the State is so foolish as to do an act which is not merely superfluous, but an act which can have no result, whatever, except a result which defeats the State's wishes. To say that the State was indifferent whether the authority should be exercised or not, is to say that the State is both so foolish as to do a superfluous act, and is indifferent whether wrongs done by one of her citizens to another shall go unredressed—whether wrongs done to herself shall go unpunished—whether right, public or private, shall be left without a guard: and to say this, is to say that the State has prepared the whole body of her law, both civil and criminal, without an object; for if the State is indifferent whether her laws be executed or not, what motive can she have had for preparing those laws? To say that the State's purpose was, that the authority should be exercised, remains the only thing supposable.

Now, what is the will of the principal, is the law of the agent;

and the more especially, if the principal be the sovereign, and the agent a subject or citizen. And whatever is the law to a man, he is bound to obey. A Judge being the State's agent, and having had authority given him by the State to preside in certain cases, and thus having been notified of the will of the State, that he should preside in those cases, it follows that he is *bound* to preside in them—bound to preside in *all* the cases.

It is not for the Judge to elect one sort of case for presiding in, and to reject another. If any thing of that kind is to be done, it is to be done by the State. As to the Judge, the cases all stand upon the same footing.

If, when the Judge has been authorized to sit in all cases, it is not his duty to sit in all, which are to be the excepted ones—and what is to be the ground of exception? Are they to be cases in which, for some reason or other, it would be disagreeable to the Judge for him to preside? If so, whether the Judge shall preside in any case whatever or not, will depend upon the Judge's pleasure. Are they to be cases in which, for some reason or other, it would be disagreeable to the parties, or to any party, for the Judge to preside? If so, whether the Judge shall preside in any case whatever, or not, will depend upon the pleasure of any party in the case. And what cases remain to be the excepted ones, if none of these are to be excepted cases?

But as to the Judges of the Supreme Court, this duty, it seems to me, has been prescribed to them by the Act organizing that Court. That Act, in its third section, says, "It shall be the duty of all the Judges of said Court to attend, at each term; but if, from Providential cause, any one of said Judges cannot attend a Court, such Court may be holden by two Judges." Why is it made the duty of each Judge to attend at every Court? There can be but one answer—that each may sit and take a part in deciding the cases returned to every Court—in deciding one of such cases as much as another, provided that the authority to each Judge to sit in one, is the same as it is to sit in another. When the authority to sit in one case, is the same as it is to sit in another, is not the duty to sit in one, the same as

it is in another? If the intention was not this, here was the place to say so, and to specify the cases on which it was not to be any Judge's duty to sit. And here is specified one single case, in which a Judge is excused from sitting—and that case is, when he is kept from being in attendance, by Providential cause. No other is specified. And *inclusio unius exclusio alterius*.

Considering it, then, to be true, that it is the duty of a Judge to sit in all cases in which has been given him authority to sit, I proceed to the question—what cases are they in which no authority to sit has been given a Judge? What cases are they which a Judge is disqualified to preside in? These being seen, those which a Judge is qualified to preside in will also be seen.

It is a maxim of the Common Law, that a man cannot be judge in his own cause. "*Aliquis non debet esse iudex in propria causa.*" (1 *Coke Litt.* 141 a.)

Within this maxim a number of cases have been held to fall, although not cases in which the Judge was a party, viz: cases in which the Judge, though not a party, had an interest. (14 *Vin. Abr.* 574-6.)

Then there have been a number of other cases, in which individual Judges have held themselves disqualified to sit, although they were neither parties in the cases nor interested in them. A Judge has declined to sit on account of "being connected with the parties", (5 *Maule & Sel.* 21,) or "being connected with one of the parties," (5 *Durnford & East*, 5,) or for having, when at the bar, been "Counsel in the cause," (1 *Barn. & Adolph.* 605. 1 *Brod. & Bing.* 161,) or for having been "consulted" in the case, (6 *Barn. & Cr.* 566. 3 *Barn. & Adolph.* 2;) or for having been "concerned" in the cause, (2 *East.* 272, *do.* 389, *do.* 478, *do.* 520, *do.* 555, 3 *do.* 245, *do.* 393, 2 *Bos. & Pul. New. R.* 451.) There have been cases in which two out of four Judges have declined to give any opinion, "as they had been engaged in the case while at the bar," (5 *Maule & Sel.* 103.) In *Doe ex dem. Early of Jersey vs. Smith*, (5 *Maule & Sel.* 475,) a case of this sort, Lord *Ellenborough* said

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"that only two Judges were in a situation to pronounce any judgment, the other two having, when at the bar, been engaged in the case."

The example of these English Judges has been followed by the Judges of this Court. Instances of that are to be found in 1 *Kelly*, 29, 275, 348, 365, 402, 466, 481, 513, 525, 598, 639.

To bring all of these cases within the maxim, that a man shall not be a judge in his own cause, it is necessary, it must be confessed, to read that maxim most liberally, according to its spirit and not to read it according to its letter. But if they cannot be brought within it, they have to stand without justification, for there is no other maxim or law, of which I am aware, within which they may be brought.

Admitting them to be within the maxim, it may be doubted whether the maxim, itself, has not been repealed by the part of the Constitution of the State which provides for the establishment of this Court, and by the Act of the Legislature which establishes the Court.

In the Constitution are these words: "The Supreme Court shall consist of three Judges", &c. "And the said Court shall, at each session in each district, dispose of and finally determine *each and every* case on the docket of such Court, at the first term", &c.

The expression "each and every case", is broad enough to include all cases of the kinds above enumerated. And all cases which it includes, the Court is required to determine; and the Court is declared to be a something which shall consist of three Judges; and is it not clear that what consists of but two Judges does not consist of enough to constitute that something? Did not the Constitution intend that it should take all three of the Judges to make a Court? If it did, then, when it required the Court to determine "each and every case" on its docket, it required each of the three Judges to sit in each and every such case; for the sitting of each Judge is essential to the making of the Court, and so is essential to a determination of any case by the Court. In short, if the Constitution intended it

to take all three of the Judges to make a Court, then when it said the Court should determine "each and every case" on its docket, did it not repeal the maxim, a man ought not to be a judge in his own cause? The notion that this part of the Constitution intended it to take all three of the Judges to constitute a Court, derives support from other parts of the Constitution.

The third section of the first article has these words:—"The Senate shall be elected biennially" "and shall consist of forty-seven members," &c.

The seventh, these: "The House of Representatives shall be composed of one hundred and thirty members," &c.

The twelfth, these: "a majority of each branch shall be authorized to proceed to business, but a smaller number may adjourn from day to day, and compel the attendance of their members in such manner as each House shall prescribe".

In the old Constitution, that of 1777, are to be found provisions similar to these, and also a provision in these words: "All causes" "shall be tried in the Supreme Court", "which Court shall consist of the Chief Justice and three or more of the Justices residing in the county. In case of the absence of the Chief Justice, the senior Justice on the bench shall act as Chief Justice", &c.

This language in the third and seventh sections, which the Constitution applies to both branches of the Legislative department, is the same, or the same in substance, as that in another section, which we have seen it to apply to as much of the Judicial department as is constituted by the Supreme Court. The Supreme Court shall consist of three Judges". The language, therefore, it is to be presumed, was applied to the Supreme Court in the same sense in which it had been applied to the two branches of the Legislative department. But as to those branches, is it not clear that the Constitution considered the language as saying, that to make a senate, it should take full forty-seven members; to make a House of Representatives, full one hundred and forty; for if the Constitution did not consider the language to say this, what reason had it for inserting the provision contained in the twelfth section. The provision that

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"a majority of each branch shall be authorized to proceed to business"?

Now this provision in the twelfth section, is confined to the two branches of the Legislature. It is not extended to the Supreme Court. It is not said of the Supreme Court that a majority of its members shall be authorized to proceed to business. And *inclusio unius exclusio alterius*.

Indeed, an argument of the same sort is to be drawn from the sixth section of the third article which concerns the Inferior Court, in which it is said, "the Inferior Court shall have power to vest the care of the records and other proceedings therein, in the Clerk, or such other person as they may appoint, and any one or more Justices of the said Court, with such Clerk or other person, may issue citations and grant temporary letters", &c.

The Act of the Legislature for organizing the Court is, in this particular, stronger in some respects, perhaps, than the Constitution. It uses this language: "the said Court shall consist of three Judges," &c. "It shall be the duty of all the Judges of said Court to attend at each term of said Court: but if, from Providential cause, any one of said Judges cannot attend a Court, such Court may be holden by two Judges. If only one Judge shall attend a Court, it shall be his duty to open the Court, and to adjourn it to a day not more than two days beyond the regular term, at which time, if two Judges do not attend, the Court shall, in that case, be adjourned to the next regular term." (Sec. 3.) "The Supreme Court shall proceed, at the first term, (unless prevented by Providential cause) to hear and determine each and every cause which may, in manner aforesaid, be sent up," &c.

"If, from *Providential* cause, any one of said Judges cannot attend a Court, such Court may be holden by two Judges." Is not the implication this: that if the cause which keeps a Judge absent be *Providential*, then the other two Judges may hold the Court: but if the cause be any thing else than *Providential*, then the other two may not hold it. If so, again *inclusio unius exclusio alterius*.

And if the idea was that a majority of the Judges might, in general, be sufficient to make a Court, it may be asked why was imposed upon each Judge the duty in terms so peremptory, "*to attend at each term.*" Why was not attendance left to the discretion of each Judge—to the sense which each might entertain of his own duty, in the same manner as the attendance of members of the Legislature is left to each member's sense of his duty?

In other respects, the Act is like the Constitution—like that, it requires the Court "*to hear and determine each and every cause which may be sent up*" to the Court.

All these things taken together, not to mention the rules of the general law, as to the strict construction of naked powers, and as to the manner of executing powers delegated to more persons than one, I think there is enough to make it most doubtful whether both of the following propositions are not true: First. That it takes *all three* of the Judges of the Supreme Court to make that Court, on all occasions, except those on which Providential cause prevents one of the Judges from sitting. Secondly. That the Court, thus made, has to hear and determine *each and every* case before it.

If it be assumed that both of these propositions are true, then it follows that the rule, a man ought not to be a judge in his own cause, is repealed, unless the words "*each and every case*" be restricted in their meaning.

Let it be assumed, that these words are not to be restricted in their meaning, and that with these words, in their unrestricted meaning, the propositions are true.

This assumed, let us apply the propositions to a possible case, and see how they will work.

Suppose the case before the Supreme Court to be a case in which one of the Judges of that Court is an actual party—say the defendant in error. What would be the effect of these propositions, if true, on such a case? This: First. All three of the Judges would have to sit in the case. Secondly. There would be a *chance* for reversing the judgment. Two of the three Judges would be disinterested, and they, if the other dis-

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sented, could render the judgment of the Court. The other might, himself, after hearing argument, come to concur with his associates. It is at least certain, that there would be a *chance* for the judgment to be reversed—a better chance than there would be if all three of the Judges were the defendants in error. And there is Common Law authority to the effect, that when all of the Judges of a Court are parties defendants in a case, they must nevertheless sit in the case “for necessity.” (14 Vin. Abr. “Judges” (A.) 7 *Grant on Corporations*, 281.) It does not, it seems, take all of the Judges of the King’s Bench or Common Pleas, to make a Court. And so, if only one of the Judges of those Courts is interested in a case, his fellow Judges may decide it.

The effect, then, of these propositions, if true, upon the case supposed, would be to give the plaintiff in error, the party opposed to the Judge, a *chance* for a judgment in his favor—a chance for a reversal.

Suppose, now, the plaintiff in error to object that the Judge, who happens to be the party defendant in error, ought not to sit; and that that Judge yields to the objection, what is the effect of that? It amounts to an affirmance of the judgment below. The effect is to make the Judge certainly gain the case, and the objecting plaintiff, his adversary, certainly lose it.

Now, the only difference between this supposed case and the real case is, that in the real case, the Judge, against whose sitting the objection was made, was not at all a party in the case. He was only of Counsel in a like case—only the connexion of a party in a like case.

But suppose the words, “each and every case” in the latter of the two propositions, are to be restricted in their meaning—restricted to such cases as by the law existing at the time when those words were used by the Constitution and the Statute, it was lawful for a Judge to preside in, viz: cases in which he was not a party and so forth, then what would be the effect of the propositions upon the case supposed? The certain affirmance of the judgment of the Court below. One of the Judges would be the defendant in error. He could not sit. The other two

would not be sufficient to make a Court—and without a Court, no judgment, of any sort, could be rendered in the case; and therefore, the judgment of the Court below would have to stand good—that is to say, the effect of the law's not allowing the Judge to sit in his own case, would be to make him gain it to a certainty. This being the law, whether sitting or not sitting would be to the interest of the Judge, would depend simply upon whether he was plaintiff in error or defendant in error.

The difference between this supposed case and the real case has been above stated. The effect of yielding to the objection, that the Judge ought not to preside in the real case would, these propositions, in this restricted sense of the words, “each and every case”, considered as true, have been to make the party objecting certainly lose his case. The effect of not yielding to the objection, was to give him a chance to gain it—a chance which, as it happened, resulted in success.

Now I have not said that I consider to be true, both or either of these propositions, viz: first, that it takes all three of the Judges of the Supreme Court to make a Court, on all occasions, except those on which one Judge is, by Providential cause, kept from sitting. Secondly; that the Court, thus made up of all three Judges, must determine “each and every case” before it. What I say is, that it is very doubtful to my mind whether they are not true.

If true, and the words, “each and every case” in the second, are to have their literal meaning, then I think it clear that the law expressed by the propositions, repeals the maxim, that a person ought not to be a judge in his own cause.

If true, and these words are not to have their literal meaning, but are to have a meaning restricted to cases in which, by law, it was lawful for Judges to preside, viz: cases in which they were not parties or the relations of parties, or in which they had not been of Counsel before they became Judges, then the law expressed by the proposition does not repeal that maxim; but it is capable of producing, in some cases, an effect which it was the object of that maxim to prevent from being produced

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in any case—the effect to make it *certain*, that if the case be that of a Judge who is defendant in error, his *not* sitting will amount to the gaining of his case.

The questions involved in these propositions have never, as far as I know, received any consideration from the Supreme Court. The Judges of the Court, however, have, from the beginning, acted upon the notion that two Judges could make a Court and render a judgment, not only in cases in which the cause that kept the other Judge from sitting with those two was Providential, but also in cases in which the cause was other than Providential, as in cases in which the Judge was a relation of one of the parties, or had been of Counsel for one of them.

It has frequently happened that one Judge has declined to sit in a case for one of the reasons aforesaid, and the other two have rendered a judgment in the case. The example thus set by the other Judges, I have felt myself, not without some difficulty, at liberty silently to follow. The practice, as far as I know, has not been complained of by those on whom it has had direct operation—the parties in such cases, or by any others—still, I must say that I have never yet made up my mind, as to whether a judgment pronounced by two only of the Judges of that Court, in a case in which the third did not sit—did not sit for some reason that was not Providential, was valid.

Admit, therefore, that the old maxim—a man cannot be a judge in his own case, has not been repealed or at all affected by the parts of the Constitution, and of the Statute organizing the Supreme Court, to which I have referred, yet, it is certainly true that by those parts, the maxim has not been enlarged. It is certainly true, that no reason can be found in those parts of the Constitution and of the Statute, to multiply the *variety* of cases to be subjected to that maxim.

This maxim, then, being to be taken as in force, to its full extent, what is that extent? It is what we have already seen. The extent is to disqualify a Judge from sitting in all cases in

which he is a party or the relation of a party ; or in which he has been concerned as Counsel, and in no others. The maxim does not extend to a case, which may happen to be *like* some case in which one of the parties may be the Judge's relation, or be a person who was the Judge's client, when the Judge became Judge. Not a case—not a dictum—not an instance—not an opinion of any law writer or other was cited, to show that the maxim does. Not a thing of the sort, as far as I know or believe, exists. To make the maxim go this length, it would have to be read as saying that a person should not sit as Judge in any case in which was involved a question which was also involved in another existing case, whether in suit or not, which might possibly, some time or other, come before him to be adjudged, or might not, in which he or some relation of his was a party, or in which he who was a party, was one for whom the person, before he became Judge, had been of Counsel. And to read it as saying this, would be to read it as disqualifying a man to sit as Judge in cases of the following kinds:

Say the Judge is a stockholder in a bank or in a rail-road, or has a relation that is one; or at the time of his election as Judge, was Attorney for the bank or the rail-road, or for some stockholder in either. The case is against another bank, or rail-road, or stockholder, in one or the other, and is such as to involve the question, whether a bank, as the indorser of a bill of exchange, is liable, on notice of dishonor given to the president or to the cashier, or to the teller, or to a director; or liable without any notice at all; or liable if the indorsement is not made by signature and counter-signature of president and cashier; or liable if the indorsement is not directly and expressly authorized by the board of directors, &c. &c.

Or such as to involve the question, whether the rail-road is liable, as a common carrier, &c. &c.

Or such as to involve any question, as to whether either the bank or rail-road is liable, under the *general* law applicable to corporations.

Or such as to involve the question, whether a failure to do something required to be done by some provision which is com-

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mon to all bank charters and rail-road charters, does not amount to a forfeiture, or to cause for a forfeiture of the charter.

Or such as to involve the question, whether the Legislature has not power to repeal a charter.

Or in short, say the case is such as to involve any of the thousand possible questions which are common to all banks and all rail-roads, and all stockholders in either.

Or say that the Judge happens to be a landholder, by grant, from the State; or is a relation to a person that is such landholder, or was, when elected Judge, Counsel for a man whose case turned on the validity of a grant from the State for land, and the case before him is that of some other man, which involves the question, whether the Legislature can annul a grant or make a young grant take precedence over an old; or whether a grant carries with it mines and minerals, or any of the possible questions which are common to all grants.

Or say the case is one which involves the question, whether one of the parties to it is bound to pay the poll-tax imposed by the general tax law on all persons, the Judge included, he insisting that the Legislature has no power to pass such a law.

In this case—in all these cases, and in others indefinitely numerous, of similar character, this reading of the maxim makes it illegal for the Judge to sit.

The result of such a reading would be, or come near to being, to make the cases in which a Judge is disqualified to sit, as numerous as those in which he is qualified to sit. And such a result I know of nothing sufficient to bring about, except a law made by the law-making power—a law sufficiently enlarging the maxim, a person ought not to be a judge in his own cause, to bring it about.

The case in which this objection to my sitting was made, is, in some respects, a peculiar one. On one side of it the party is the holder of bank bills; is therefore one of a class, which, for all practical purposes, may be said to include in it all the people of the State, not even excepting the Judge objected to, for every man holds, or expects to hold, the bills of some bank; and so, has an interest in preserving a sound bank-bill cur-

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rency. The bills of which this party, thus belonging to this powerful class, is the holder, are the bills of a broken bank—of a bank which, perhaps, a great majority of that class may have come to believe or suspect to have been broken by its stockholders, on purpose to defraud them—of a bank, the bankruptcy of which, unless those stockholders should be compelled, individually, to make good the bankruptcy, that whole class may consider calculated to have, as an example, a bad effect on all the other banks of the State—those other banks whose bills constitute almost the entire money of the class. On one side of the case, such is the party; on the other, the party is one of the stockholders in that broken bank. The Judge objected to, has, for father-in-law, one who is sued as a stockholder in another broken bank, in a suit similar to that against this stockholder, in this broken bank.

Question—which party to this case, is it most to the Judge's interest to decide in favor of? If he decides against the bill-holder, and can get one or both of the other two Judges to go with him, it is possible that the decision may, in the long run, work to the benefit of his father-in-law, by having some influence, in fact, on the decision of the case against him. If he decides against the bill-holder, but cannot get either of the other two Judges to go with him, it is not possible for his decision to work at all to the benefit of his father-in-law, because a dissenting decision or judgment counts for nothing.

From this is to be seen the degree of interest which the Judge has to decide *against* the bill-holder.

If he decides in *favor* of the bill-holder, it is possible, perhaps not improbable, that he shall please nearly every man in the State, as every man is the holder of the bill of some bank, or is continually expecting to be; if, in so deciding, he puts in possible peril one who is as near to him as father-in-law, and also one or more who were as near to him as clients, it is possible—is it not probable—that he shall give nearly every man in the State exalted pleasure—fill him with a proud rapture at the idea of having to preside over him, a Judge of such magnanimity—such purity—such love of justice.

If, therefore, he thus decides, he stands a good chance, not only to retain all of his old popularity, but to add to the old much that is new. Is popularity worth any thing to him? is it prized by him? He wished to be a Judge—popularity made him a Judge. Does he wish to be made Judge again, or to be made any other dignitary? It is only popularity that can gratify his wish.

Behold what the Judge stands a chance to *gain* by deciding in *favor* of the bill-holder.

By deciding *against* the bill-holder, may the Judge *lose* any thing? The Judge, by deciding against any bill-holder at all, risks offending the whole, or nearly the whole of his fellow bill-holders—a class co-extensive with the people of the State—by deciding against one, when it is possible that such, the Judge's decision, may operate to the benefit of a person who stands to the Judge as father-in-law—of another who stands to him as a former client—the Judge risks not only offending this proportion so large—of this class so extensive—he also risks inspiring it with the horrible suspicion that he is a corrupt Judge. The Judge risks more than his popularity.

See, then, what the Judge, by deciding *against* the bill-holder may *lose*.

A dissenting decision against the bill-holder—a thing that counts for nought—has not the Judge every thing to lose—nothing to gain by making that? If yet he will sit and make such a dissenting decision, does it not seem certain that he is actuated, in his conduct, by some motive stronger than that of personal loss or gain? Does it seem impossible that that motive can be a sense of duty?

The only reason given in support of the objection to the Judge's sitting in this case was, that the decision of the case would be, in law, a decision of the other cases. It was said that this case would be a precedent for those, and that Courts are bound by precedents.

This is a mistake. Courts are bound by nothing but law, and nothing is law but something that is made law by the law-making power. Courts are not this power. They are express-

ly forbidden, by the Constitution, to exercise this power. "The Legislative, Executive and Judicial departments of Government shall be distinct, and each department shall be confided to a separate body of magistracy; and no person or collection of persons, being of one of those departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted". (*I. Sec. 1 Art.*)

In a case between A and B, say as to what is lawful interest for money. The Court decides it to be ten *per cent.* Are all future Courts, in all future cases, to say it is ten per cent. ? or are they to go by the word of the law-making power, which says such interest is seven per cent. ? In the case supposed, however, say the decision is, that the interest is seven per cent. Are future Courts, when they too say seven per cent. to be considered as saying so because of that decision, or because of that law on which that decision rests ?

What, then, is a decision worth ? It is, to the parties to it, worth all that a law would be worth. To the parties to it, a decision may, indeed, without any great departure from propriety of language, be said to be a law. To A and B, the parties to it, the decision is a law—to the rest of the alphabet it is none. Are previous decisions, then, worth nothing, to operate on future decisions ? Decisions are evidence to show the opinion which the Judges making them have, as to what the law is on the question decided. They are evidence of opinion, and they are worth what opinion is worth. What opinion is worth, depends upon many things. It is worth nothing, when it stands on one side, and law stands on the other. When it is doubtful on which side the law stands, then Judicial opinion, as to the side on which the law stands, if it be of good quality, and especially if it be also of good quantity, is worth much. But in no case does it *govern*—in no case is it *law*. The respect which is paid to it, is paid voluntarily. The Courts, if they choose to depart from it, and go by their own original opinion of what the law is, always do so. And what respect is it likely that Courts would voluntarily pay to a decision made by a Court, one of the members of which was, say a party to the decision ?

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And what if the Legislature were to come in, and by a declaratory Statute, say that the law was not such as the decision made it out to be, but was so and so; and that the decision was not to count as any evidence of what the law was?

Be the influence of precedents, however, what it may, there is no law which says a Judge is disqualified to sit in a case, the decision in which may chance to be claimed as a precedent in some other case in which he or some connection of his, or some person whom he was Counsel for at the time when he became Judge, may be a party. And there is a law, as I think I have shown, that he must sit in all cases in which he has been authorized to sit.

Upon the whole, my conclusion was—First. That it is a Judge's duty to sit in every case in which authority to sit has been given him. Second. That authority had been given me to sit in this case.

So, considering it to be my duty to sit in the case, in it I sat. I was not aware of any right in me to make the case stand on a footing different from that on which other like cases stand—of any right in me to have one rule for one case, another rule for a fellow case.

I may remark that this, my opinion, of what law and duty is on the point in question was known—well known to the Legislature which made me Judge.

In this case, the plaintiff in error, by his Counsel, insisted that the following proposition is true: "our proposition is, that plaintiff is entitled to recover the whole amount of his bills out of the defendant, if the number of his shares and the value thereof is equal to the amount of his bills; and that a recovery against the defendant, is a good plea, in bar to any and all actions brought against him by bill-holders, except as to costs". I quote from the printed argument of one of the Counsel—Judge Nisbet.

By the words "*value thereof*," the Counsel mean the value of the shares got by considering the shares as each worth one hundred dollars. They say, "we admit, as stated by this Court, that the liability of the defendant is *proportional*. He

is bound to pay his proportion of the indebtedness, and that proportion is fixed by the charter. It is an amount equal to the number of his shares at the value of \$100 per share". I againe quote from Judge Nisbet's printed argument.

By the words, "a recovery against the defendant, is a good plea in bar to any and all actions brought against him by bill-holders, except as to costs," they, the Counsel, mean not only that such a recovery is such a good plea in bar, but that a *voluntary payment* of the bills made by the stockholder, is equally such good plea in bar. They mean that the stockholder will be as much protected, if he voluntarily takes up bills, as if he is forced, by suit at law, to take them up. They say, "if we are right in our positions, that the defendant is our debtor to the full amount of his liability, and that we have the right to demand and have it of him, then it follows, as an inevitable legal inference, that he cannot be compelled to pay it to any body else. Satisfaction to us is a defence to him against the world. According to naked principles of justice, as well as the settled rules of the law, a man cannot be compelled to pay to any body, a debt which he has paid to the rightful creditor, or for which, to him, he has become personally charged". "They (the bill-holders) are in the position of a number of creditors of a common debtor, who is able to pay only a given amount.

They stand primarily equal in their right, but he who is *bona fide* preferred and paid, may receive payment without wrong to any body. And he who is vigilant and sues and gets judgment as in all other cases, acquires a preference under the law".

The *extent* of a stockholder's liability is a sum equal to the value of his stock, *rating his stock as worth one hundred dollars a share*; the *manner by which the liability may be discharged*, is by the stockholder's *taking up bills to an amount equal to the value of his stock, rating his stock as worth \$100 a share, or by his coming under obligation, by judgment or otherwise, to take up bills to that amount*. This is what the Counsel mean by their proposition, as I understand them.

And that proposition, in this sense, if I mistake not, was,

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by a majority of this Court, approved and made the ground for over-ruling the decision of the Court below. I could not approve the proposition. Therefore, I could not agree to make it a ground of over-ruling that decision. Whether the proposition be true or not, depends upon what is the meaning of the eleventh section of the charter of the Planter's & Mechanic's Bank of Columbus. That section is in these words: "The persons and property of the stockholders shall be pledged and held bound, in proportion to the amount of shares and the value thereof, that each individual or company may hold in said bank, for the ultimate redemption of the bills or notes issued by said bank, in the same manner as in common actions of debt; and no stockholder shall be relieved from such liability by sale of his stock, until he shall have caused to have been given sixty day's notice in some public gazette of this State".

What is the meaning of these words? It is, in my opinion, such as not only not to support, but such as to oppose the proposition; and that in every important respect.

As I think these words do not mean to say, that in a valuation of the shares of stock for any purpose, the shares are to be considered worth the fixed sum of one hundred dollars each, regardless of whether as much as \$100 a share has been paid the bank on them or not—or mean to say, that in all cases when the stockholder has taken up or become bound by judgment to take up bills, to an amount equal to the value of his stock, he is, as a matter of course, discharged from all liability to take up other outstanding bills—or mean to say, that the quantity of any stockholder's property, liable to the ultimate redemption of bills, is to be a quantity equal to the value of his stock, let the value be rated as it may.

For thus thinking, I will now give my reasons; and then I will state what I think to be the true meaning of the words, and my reasons for so thinking.

First, then. Is the *value* of each share meant by these words, a fixed sum of \$100, or is it a sum equal to the sum which may have been paid in on the share, or is it something else?"

How is this question to be determined?

1. By an appeal, in the first instance, to the very "words" themselves.

2. If the words fail to give a clear meaning, then and not till then, by an appeal to the "context"; that is, to Legislation *in pari materia*.

3. If the context fails to give a clear meaning, then and not till then, to the "subject matter".

4. If this fails, then to the effects and consequences.

5. Or, to that which perhaps includes the effects and consequences—the "spirit and reason" of the words.

For these answers to the question how? I go no further than to *Blackstone*. (1 *Black. Com.* 60.)

Let us then appeal, first, to the *words*. The words are, "in proportion to the amount of shares and the value thereof". There is nothing in these bare words, from which it can be argued that the meaning is that the "value" is to be considered as of *any* fixed sum. These words certainly are plainly, not *per se*, equivalent to these; "in proportion to the amount of shares and the value thereof, rating the value thereof at \$100 a share".

The only meaning, as it seems to me, which is to be drawn from these words thus taken by themselves is this—in proportion to the amount of shares and the value thereof, rated at what the shares sell for *in market*. When men speak of the value of a horse, a piece of land, State stocks, stocks generally, they mean the value of each thing, estimated according to what it will fetch, when exposed to sale in open market.

When the Legislature and the stockholders in this bank used the word value, in connection with the stock of the bank, is it to be said that they used the word in a sense different from that in which all men use the word on similar occasions? If it is, then, it must be, for some reason, outside of the mere words.

The meaning to be drawn from the *naked words* is, that the value of the stock is to be estimated at the *market value*.

What says the "context"? Does the context say the value of the shares is to be estimated at \$100 each share? The second section of the charter declares that "The stock of the

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company shall consist of one million of dollars, in shares of one hundred dollars each, and the stockholders in said bank are hereby required to pay twenty-five per cent. on the amount of their capital stock, in specie, before the board of directors shall be permitted to issue their bank notes, and the remainder of their subscription in such sums, and at such times, as the board of directors of said bank shall require." Does this declaration mean that the shares are to be considered to be of the *value* of one hundred dollars each, as soon as subscribed, whether any thing may have been paid upon them or not? Does it mean that subscribed shares are to be considered of *equal value* with paid-up shares? If so, why does it require, as a *prerequisite to organization—to corporate existence*—that so large a per cent. of the subscribed shares shall be paid up in specie? Why does it not allow the banking to begin upon the basis of the mere subscriptions? If so, why was it said in the fourth rule, that "The total amount of debts which the said corporation may, at any time owe, whether by bond, bill, note or other security, shall not exceed three times the amount of their capital stock actually paid in, over and above the amount of specie actually deposited in the vaults for safe-keeping? Why was it not rather said that the total amount of debts shall not exceed three times the amount of the stock *subscribed*, over and above the specie in deposit?

It seems to me plain that the declaration in this second section, means that a *subscription* of a million of dollars in stock, is *not* to be considered of the value of \$1,000,000, until a \$1,000,000 have been paid upon it. The declaration seems to me plainly to mean, that a subscription of a million of dollars is to be considered of *no value whatever*, until 25 per cent. of it has been paid; and that after that per cent. has been paid, it is to be considered, as to all banking purposes, of no more value than the value of that per cent. thus paid upon it.

The directors have power to call for payment of the remainder of the subscriptions? True, but this being a power to be used at the will of the directors, and the directors being the creatures of the stockholders, payment may never be called

For. And if ever called for, the call may remain unanswered, either by reason of inability, or indisposition on the part of the stockholder to comply with it; and if of indisposition, the consequence may be merely a forfeiture to the bank of the stock subscribed. The existence of this power, it was plainly intended, should not add a cent. to the value of the basis on which the bank was allowed to do business, viz: to the value of the capital actually paid in, *plus* the deposits in specie.

Thus far, then, there is nothing in the "context" to affect the meaning which we had got from the "words", viz: that the value of the shares is to be taken to be what is their market value.

There is other legislation in *pari materia*, as the *Tax Act of 1817*.

This act declares that "there shall be annually paid to the State, a tax of thirty-one and a quarter cents on every hundred dollar's value of bank stock operated upon or employed within this State, which tax shall be assessed and collected in the manner following, viz: It shall be the duty of the president and directors of every bank incorporated by the Legislature of this State, to cause the cashier thereof to transmit to the Treasurer of the State, annually, a return sworn to by him before some Justice of the Inferior Court or of the Peace, in which shall be stated the amount of capital stock annually paid in on the first day of January preceding the time of making such return, and on or before the first day of December in each year, cause to be paid into the Treasury, free of any cost or deduction whatever, the said sum of thirty-one and a quarter cents on every hundred dollars of capital stock returned in manner aforesaid." This Act was made to extend to banks established as well after as before its passage. (*Pr. Dig.* 859.)

The principle of stock valuation contained in this Act, is recognized, and more vigorously applied in the Act of 1845, "to compel the banks of this State to pay a tax on the highest amount of bank stock" thereafter "returned by them as subject to taxation." (*Cobb Dig.* 1077.)

This principle is the one which, by other tax Acts, is used

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for assessing the value of stock in corporations of other kinds. ~~as~~ as by the Act of 1820, for assessing the value of the stock in ~~the~~ the Steamboat Company of Georgia. (*Prince Dig.* 1079.) ~~by~~ by the Act of 1850 "supplementary to the general tax laws", for assessing the value of the stock of the Macon & Western ~~Rail-road~~ Rail-road—by the Act of 1850, to collect a tax for 1850 and ~~1851~~ 1851, for assessing the value of the stock in the Memphis ~~Branch~~ Branch Rail-road.

The taxation of the stock of the Central Rail-road and the ~~Georgia~~ Georgia Rail-road, is regulated by the respective charters of those corporations. By those charters, the tax has to be on ~~net~~ net income.

The Act of 1817 was in operation at the time when the Act incorporating the Planter's and Mechanic's Bank was passed. By the terms of the Act extending it to banks to be established after the date of it, the Act applies to that bank. For one great purpose, that of taxation, the Act absolutely prescribes what shall be considered to be the value of the stock of the bank; and that is, "the amount of the capital stock actually paid in." This it is, that is to be considered the value of the stock, for the great purpose of the taxation of the stock.

Other acts prescribe a similar rule of valuation for stock, in the case of corporations of other kinds—of the great internal improvement kinds.

From all this, is it not to be inferred that the Legislature considered the general principle for assessing the value of all corporation stocks, in cases in which they were to be assessed at all, to be the amount of money actually paid in on the stocks? I think it is. When the Legislature has fixed the value of a thing at so and so, for one great and general purpose, and afterward, in connection with another not very dissimilar purpose, speaks of the value of the thing, in my opinion, it has in mind that same value which it had before fixed, for the thing.

But, at least, did not the stockholders, when they accepted the charter, have ground from this Act, for insisting that they accepted it in the sense that the value of their stock was to be rated; no higher, in estimating their liability to pay the debts

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the bank, than in estimating their corporate liability to pay
 it; no higher in estimating their liability to pay one sort of
 to the public, than in estimating their liability to pay an-
 other sort of debt to the public?

The result, then, of the appeal to *these Statutes in pari materia*
 has the meaning of the words "value thereof" aforesaid,
 in the charter, is not the *market* value of the shares, as the
 is naturally import, but a value equal to the amount of
 by actually *paid in* on the shares.

may, however, be said, that as a general thing, this value
 the market value will not greatly differ.

This result is one not to be affected by any thing, of which
 I am aware, in the "subject-matter"—the "spirit and reason"
 in the charter, or "in effects and consequences".

I say that I am wrong in this conclusion, and that in
 ascertaining the liability of the stockholder, the stock is to be esti-
 mated as of the value of \$100 a share; then I cannot agree
 with the majority of the Court, that this liability is one which
 is discharged by the stockholder's taking up bills to an
 amount equal to the amount of his stock, or by his becoming
 bound, by judgment, to take up bills to that amount, wholly
 regardless of the question, whether or not there may not be
 any outstanding bills, wishing to be taken up.

Supposing now, for argument's sake, that the true mode for
 ascertaining the amount of a stockholder's property, which is liable for
 the redemption of the bills of the bank, is to measure the
 value of his stock and to take an amount of his property equal
 to that value, then I say that in my opinion, this amount of
 property, whatever it may be when found, is to be divided out
 among all the bills needing "ultimate" redemption, and giving
 notice of their existence to the stockholder; and that if he,
 after getting such notice, applies the whole amount of the prop-
 erty to the payment of some of the bills to the exclusion of
 others, he does *not*, thereby, become discharged from those
 others.

In such a case, (assuming that the charter, itself, fixes no
 mode of distribution,) I think that the law requires the fund or

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property to be divided out among all the bill-holders, claimants upon it, in proportion to the respective amounts of their bills; and that if the stockholder does not see to it, that the property is so divided out, he renders himself liable to such bill-holders as do not get their proportionate share, to make good to them that share out of his other property.

This opinion is founded upon the words of the charter, and upon a vast body of law in *pari materia*.

The words of the charter that I rely upon, are these: "the persons and property of the stockholders shall be pledged and held bound" "for the ultimate redemption of the bills or notes issued by said bank". I understand by the words, "the bills or notes", all the bills or notes. If I am right, then, by the words of the charter, the property of the stockholder is pledged and bound to the ultimate redemption of each and every bill issued by the bank. Every bill or note, therefore, has a right to a share in this property. How, then, can the stockholder justify himself for taking the whole property, thus belonging, in shares, to all, and giving it to one? or which is the same thing, justify himself for letting so large a judgment go against him, in favor of one bill-holder, as shall force from him all the property thus belonging, equally, to the other bill-holders?

But if the charter were silent, the vast quantity of law in *pari materia*, speaks a language that leaves me, as I think, no alternative but to adopt the opinion which I have above expressed. In every case in the law, which I can think of, in which a fund is to be distributed among different claimants upon it, the rule of distribution is the *pro rata* rule—the rule which gives to each claimant a share—a share proportioned to the amount of his claim.

This, by Statute, is the rule in the distribution among creditors, of the assets of a dead man; this, by Statute, is the rule by which a debtor's property is to be divided among his judgment creditors, whose judgments are of equal date; this, by Statute, is the rule by which the money of a debtor, in the hands of Sheriffs, &c. is to be divided among the debtor's judgment creditors, whose judgments are of the same date,

though the money be brought in exclusively by some "vigilant" creditor, as by some garnishing creditor; this, by statute, is the rule by which the effects of insolvents are to be divided among their creditors; this, by Statute, is the rule prescribed to a debtor "unable to pay his or her debts", who has to make an assignment of his property to his creditors; this, by Statute—by the Penal Code—is the rule prescribed to banks which, "in contemplation of insolvency", wish to make assignments of their property for the benefit of their creditors and stockholders, under penalty to the president, directors, &c. of imprisonment in the penitentiary for disobedience; this, by Statute—a Statute covering the whole ground of banking—the Statute to authorize the business of banking and to regulate the same, passed in 1838, is the rule by which judgments of creditors of the banks established under the Act, are to enforce their judgments against the property of the stockholders in those banks; this, by Statute, is the rule by which the assets of this very Planter's & Mechanic's Bank, ordered by the State into the hands of a receiver, are to be divided among the bill-holders of the bank—this bill-holder, Lane, inclusive of course; this, by the principles of Equity, is the rule by which Courts of Equity regulate the abatement of legacies—the apportionment of the payments to be made by the different purchasers of property which is encumbered—the marshalling and distribution of equitable assets. (*Pr. Dig.* 228, 435, 451, 493, 164, 37, 633. *Pamph.* 1838, p. 39. *Cobb's Dig.* 119, 120. *Story's Eq. Jur.* s. 60, f.)

The idea, then, that a stockholder may, as to his individual property, liable to the ultimate redemption of the bills of the bank, prefer one bill-holder to another, as long as the fund is, it seems to me, condemned by the words of the charter—and by a vast body of law in context with the charter—by the law that exists on kindred subjects. And here I might say, for when the answer which the "words" and the "context" give is free from doubt, we are not at liberty to go fur-

ther in search of meaning—to go to the “*effects and consequences*”, to the “*spirit and reason*” of the law.

But I will add a word as to the “*effect*” of the rule, that would allow the stockholder a chance to prefer one bill-holder to another. When a bank suspends specie payments, its bills fall at once below par, and this, no odds what may be the amount of its ultimately available assets. If there is distrust of these, the fall is great in proportion to the distrust. The existence of an ultimate liability on the part of the stockholders to redeem the bills, presents but a slight resistance to the downward tendency of the value of the bills. This experience has proved. Now, this rule gives the stockholder the full benefit of the depreciation, whatever it may be, and therefore the rule makes it to his interest that the bills should depreciate as much as possible. All he has to do is, to buy up bills to an amount equal to the value of his stock, and be discharged. He will not be fool enough to wait for judgments to be obtained against him on bills for the full amount of the bills. Before the time has come for such judgments to be rendered, he will have voluntarily redeemed bills to an amount equal to the amount of his stock, i. e. will have bought them up at the lowest price at which they may be selling in the market, and having done that, all else he will have to do will be to plead them to such suits as may be pending against him on other bills—and what means and facilities have stockholders for aggravating the depreciation of the bills of their bank, as by misrepresenting the condition of the bank; by misrepresenting the condition of the individual stockholders; by misrepresenting the quantity of bills to be redeemed; by misrepresenting the quantity that each stockholder has already redeemed; by misrepresenting the market price of the bills; by threatening all sorts of defences to suits upon the bills, and so forth and so forth. Admit that bank stockholders may be as honest as other men, yet why tempt the most honest men in this way? Why, indeed, give them the benefit of that depreciation, which at best, is inevitable on bank suspension? Would not the rule be far better if it were such as that which is applied to executors and adminis-

trators—to Sheriffs having money on which there are several judgment claimants—to the receiver appointed by the Legislature for the distribution of the assets of *this* and other broken banks, viz: that the fund is to be divided out among all the claimants upon it, *who have given notice of their claims, pro rata*—and that if it be divided out otherwise, it shall be at the peril of the depository of the fund.

I am aware that a decision of this Court was quoted in support of what I am now combatting, that made in *Bothwell and others vs. Sheffield and others*, (8 Ga. R. 569,) That case was one in which the sureties of a Sheriff asked for an injunction to restrain a number of suits, which had been brought against them on their bond, suggesting that the amount of the demands in the suits exceeded the amount of the bond, and praying that “the Court would so direct the recoveries, that the creditors first entitled, should recover to the amount of their bond; and the remainder be restrained from prosecuting their suits against the sureties”, and in which the Superior Court, on demurrer, dismissed the bill “on the ground that complainants had a complete Common Law remedy”—a decision which was affirmed by this Court. This is the whole case. The opinion is contained in eight lines, and is put exclusively upon a Statute at that—an Act of 1847. (*Pamph.* 201.)

This judgment was, I think, right, even without any Statute to give it special support. Those sureties, as far as I can see, had no more need of the aid of a Court of Equity to protect them from the overplus of suits, than has an executor or administrator the need of the aid of such Court to protect him from an overplus of suits against him, i. e. from suits on demands which exceed the value of the assets. The executor or administrator, may, at law, plead the state of the assets and of the debts relatively to each other, and at law the plea will be to him an ample protection. I see no reason why the sureties on a Sheriff's bond may not do a similar thing. Hence, I think the judgment in the case was right. If the opinion of the Court has in it more than this, the excess is but an *obiter dictum*. I doubt, however, whether it has more.

But as I have said, I do not think the rule of the majority of the Court is right in its *great* principle—that by which it gets the *quantity* of the individual property of the stockholders, which is liable for the ultimate redemption of the bills of the bank. That principle is, to take the *value* of the stock as the measure of the quantity of the individual property—the *value* at the *fixed rate* of \$100 a share. This principle, I think, is condemned by the words of the charter—by the *context*—by the argument—from effects and consequences, and by that, from the reason and spirit of the policy, establishing an individual stockholder liability.

First, as to what the “*words*” say. The words are, “The persons and property of the stockholders shall be pledged and held bound” “for the ultimate redemption of the bills or notes issued by said bank.” By the expression “bills or notes issued”, I understand is meant *all* the bills or notes lawfully issued. If I am right in this, then the positive command of the words is, that the property of the stockholders shall be bound for the ultimate redemption of *all* the bills issued by the bank. Now, if the property is to be bound for the ultimate redemption of all the bills, of course *enough* of it is to be bound so to redeem all. That is to say, an amount of property is to be bound equal to the amount of bills in circulation needing ultimate redemption. The amount of such bills may, it is true, happen to be just equal to the *value* of the stock, though the chances are many against it. The amount will almost always be either greater or less than the value of the stock. For, by another part of the charter, the bank may issue bills to any amount, which shall not exceed “three times the amount of their capital stock actually paid in, over and above the amount of specie actually deposited in the vaults for safe-keeping.” Supposing all the capital stock of the bank paid in, viz: \$1,000,000, and that the bank had on actual deposit another \$1,000,000 in specie—then it might issue bills to the amount of \$4,000,000—that is to say, to an amount exceeding by \$3,000,000 the value of its capital stock, rated at \$100 a share. But if, in such case, the bank should issue \$4,000,000 in bills, the amount of individual

erty of the stockholders which would be liable for the ultimate redemption of the \$1,000,000, would, according to the opinion of the majority of the Court, be an amount of the value of more than \$1,000,000, for it would be an amount of a value equal merely to the value of the stock, rated at \$100 a share, the value of the stock at that rate, would be only \$1,000,000. Yet the *words* say that property enough is to be bound to redeem every bill lawfully issued.

Again, the "*words*" say that "the persons and property" shall be bound "in proportion to the *amount* of shares *and* the *value* thereof." This rule, for ascertaining the amount of property liable, entirely rejects the words, "the *amount* of the shares" and confines itself exclusively to the words "the *value* thereof." But the two sets of words are not synonymous. The first set means the *number* of the shares, irrespective of their *value*. And the quantity of individual property liable, shall be got by a *proportion* in which one of the terms is made in some way, *both* of the *number* of the shares *and* the *value* of the shares. This principle absolutely rejects from the case the element or ingredient, the *number of the shares*, although the words put that element as much in the case as they do the value, the value of the shares. And, indeed, upon the principle that it is the value of the shares which is to be the measure of the quantity of individual property liable, it seems to me impossible to do any thing else than reject the words, "the *amount* of the shares." Yet these words have a plain meaning.

The language of the charter is amount of shares as well as value of shares—the language of this principle is value of shares only. So much for the condemnation of the principle; it comes from the "*words*" of the charter.

The condemnation from the context is, I think, if possible, more decided. I have examined, I believe, all of the corporate charters which contain provisions similar to that contained in the eleventh section of the charter of this bank. Most of these charters are for banks, but some are for rail-roads, some for insurance, and some, perhaps, for other purposes. There are many or more of them; and as to the times of their creation, they

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range through a period of almost forty years, from Dec. 1818, when the Bank of Darien was incorporated, to Feb. 1854, when the South-Western Bank of Georgia was incorporated. The expression used for ascertaining the amount of separate property of the stockholder that is to be liable for the redemption of the debts of the corporation, is not the same in each charter. In some charters, the expression is in proportion to the "amount of the value" of the stock; in some, in proportion to "the amount of the shares"; in some, in proportion "to the number of dollars issued on each share"; in some, in proportion "to the amount of stock"; in some, in proportion "to the number of shares"; in some, in proportion "to the shares"; in some, in proportion "to the stock". In one, (the Bank of Columbus,) the expression for the common stockholders, is one thing; for the State as a stockholder, another; for the farmer, the expression is in proportion "to the amount of the shares"; for the latter, in proportion "to the amount of *the value of shares*", both expressions being contained in the same section. (*Pr. Dig.* 86.) In one, that of the Manufacturer's & Mechanic's Bank of Columbus, incorporated in 1852, the expression is, "that the persons, &c. shall, at all times, be bound for an amount equal to the proportion of stock which he, &c. shall own". (*Pamph.* 1852, p. 35.) The provisions in the other charters may be found at pages 70, 88, 93, 96, 102, 105, 108, 112, 117, 123, 131, 314, 334, 352, 367, 377, 408, 415, of *Prince's Digest*, and pages 38, 44 of the Acts of 1851-2, and pages 163, 170, 177, 178, 182, 186, 191, 195, of the Acts of 1854.

In the expression, it will be remembered, is "the amount of the shares and the value thereof."

Now, to say is, that the principle that the property of the individual stockholders is to be determined by the amount of the value of their stock, will not work in all of these charters. It will not work in the expression is, "the amount of the shares", "the number of dollars issued on each share", or "amount equal to the proportion of stock",

or "number of shares", or "to stock", or "to the shares". And those charters in which some of these is the expression, are the great majority. The principle will only work in those charters in which the expression is, "in proportion to the *value*", and these are comparatively few; and even in one of these, that of the Bank of Columbus, it will not work throughout all the stockholders, but only through a part of them, leaving the other to be governed by some different principle.

The defect of the rule, in this respect, may be well illustrated by the case of the clause in the charter of the Bank of Columbus. By the clause in that charter, the common stockholders are to be liable in proportion to "*the amount of their shares*"; the other stockholder, the State, in proportion "*to the amount of the value of the shares*". The amount or *number* of the shares of the State and the other stockholders, respectively, may be, say 100, the *value* \$10,000. This principle will tell you that the State is liable for \$10,000, but it *can* not tell you what the other stockholders are liable for. And yet, can there be a doubt of its having been the intention of the Legislature, that in such a case, the State and the other stockholders were, respectively, to be liable for precisely the same sum?

This defect in the principle may still more clearly be shown, by a reference to those charters in which the words are, "in proportion to the number of dollars issued on each share". In these charters, it is manifest that the principle utterly fails to give any solution.

Now I think it was the intention of the Legislature, that in the case of each of these charters, the extent of individual liability of the stockholders, was to be ascertained in precisely the same way—by precisely the same rule. The principle of the majority of the Court cannot be true, if the intention were this.

So much for the present, as to what the context says.

As to the "effects and consequences" of this principle, if it is allowed to be the true one, they have already been slightly adverted to, when it was said that for the ultimate redemption

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of all bills, over and above an amount equal to the value of the stock, this principle furnishes no security from the individual property of the stockholders. And can it be said that those bills, thus issued in excess, are just the bills that need no such security—just the bills the Legislature wished to encourage the issue of?

And in connection with this topic I may ask, what was the “reason and spirit” which actuated the Legislature in putting provisions of this kind into bank charters? Was it not to get the bills of the banks paid—if possible, paid by the banks themselves; if not possible, by the banks, then by the stockholders; at all events, to get the bills paid? If this was the spirit and reason—if this was the end, and if this end was to be accomplished by first subjecting the property of the bank to the payment of the bills, and when that gave out, then by subjecting the property of the individual stockholders to their payment, is it to be presumed that the Legislature would subject, of the individual property, either more than enough to accomplish the object, or less than enough, or not rather just enough? It is not to be presumed, therefore, that the amount of the individual property of the stockholders, which the Legislature intended so to subject, was an amount equal to the value of their shares, for this value, would in more, probably, than nine hundred and ninety-nine cases out of a thousand, be an amount which would be either greater or less than the amount of the bills to be redeemed by it.

These are my objections to the rule which the majority of the Court deduce from this eleventh section of this charter.

I will now state what I conceive to be the true rule to be deduced from that section, and why I so do.

I think the following propositions are true:

1. The quantity of property of all the stockholders which is liable for the ultimate redemption of the bills of the bank, is a quantity just equal to the quantity of bills to be so redeemed.
2. This quantity of property is to consist of separate parcels, a parcel to be supplied by each stockholder.
3. Of these parcels, the quantity of any one is to be such

that it shall bear to the aggregate quantity of all the parcels, the same proportion which the quantity of stock belonging to the stockholder to supply that parcel, bears to the aggregate quantity of the stock of all the stockholders.

4. Of the aggregate quantity of these parcels, such a portion is to be advanced by all the stockholders, at any one time, as shall be sufficient to satisfy the demand upon that aggregate quantity, existing at that time; that is, as shall be sufficient to pay off the bank bill or bills, which may, at that time, be demanding ultimate payment.

5. Of this portion, thus to be advanced by all the stockholders, at any one time, the part to be advanced by any one stockholder, is to be such that it shall bear to the whole portion to be advanced by all, the same ratio which the parcel of that stockholder bears to the aggregate of the parcels of all the stockholders.

6. And as this parcel bears to the aggregate of all the parcels the same proportion—the same proportion which the quantity of stock belonging to the stockholder owning the parcel, bears to the aggregate quantity of all the stock; therefore,

7. The part to be advanced at any one time, by any one stockholder, is to be such that it shall bear to the part then to be advanced by all, i. e. to the amount of the bill or bills then to be paid, the same proportion which the stock of that stockholder bears to the whole stock.

This result is the same, in effect, as that to which the Court below arrived: which was, that the bill-holder, in this case, had the right to recover of this stockholder, such a proportion or per cent. of his bills, as the stock owned by the stockholder bore to the whole stock. It is the same, in effect, as that to which this bill-holder, himself, and his Counsel, Mr. Dougherty, first arrived. The suit in this case was originally framed so as to demand no more of the stockholder than what he would, according to this result, have to pay. And the declaration remained in this form for years, I believe. Recently, it was amended so as to make it conform to the rule considered by

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the majority of this Court the right one. And in the course of the argument, one of the Counsel for the plaintiff stated that the idea of the amendment was not original with him—that he got it from something which he read in a decision of this Court in some one of the bank cases. This is the result to which the other party, the stockholder, arrived; I may therefore say, that this result of mine is one in which the parties on both sides, if left to themselves, as well as the Court below, would agree with me. Have I not the right, therefore, to insist that this result expresses the *natural and obvious* meaning of the charter—that meaning, according to which, the charter is understood by *all* those who have an *interest* in it; and to say that at this day, to put another meaning upon the charter is to make the charter operate like an *ex post facto* Law?

Nevertheless, I will briefly state some of the particular reasons, apart from this, of contemporaneous construction, which make me think the propositions true, on which this conclusion of mine depends.

1. The language of the charter is, that “the persons and property of the stockholders shall be pledged and held bound” “for the ultimate redemption of the bills or notes issued by said bank”, &c. By the words, “bills or notes issued”, I take for granted is meant *all* of the bills or notes lawfully issued. If so, then, the amount of the language is, that as much of the property of the stockholders as shall be sufficient for the ultimate redemption of all the bills thus issued, shall be bound for the ultimate redemption of all such bills. The language does not say that more than as much as this shall be bound; and as there can be no other reason than a positive command of law, why more should be bound, I say no more is bound. Hence, I think my first proposition is true; and that is the leading one. If it is true, the rule laid down by this Court cannot be true.

2. That the quantity of property so bound, is to consist of parcels of some sort, to be supplied by each stockholder, I be-

lieve nobody disputes. I assume, therefore, my second proposition to be true.

3. The language of the charter is, that "the persons and property of the stockholders shall be pledged and held bound, in proportion to the amount of shares and the value thereof, that each individual or company may hold in said bank".

Taking my first and second propositions to be true, this language may be so varied as to read thus: "The persons of all the stockholders, and so much of their property as shall be sufficient for the ultimate redemption of all the bills of the bank, shall be bound for that ultimate redemption, such property to consist of parcels—such parcels to be supplied by each stockholder, in proportion to the amount of his shares and the value thereof."

My third proposition, is that of the parcels of property to be supplied by each stockholder; the quantity of any one parcel is to be such that the parcel shall bear to all the parcels taken in the aggregate, i. e. to the whole quantity of property to be supplied by all the stockholders, the same proportion which the quantity of stock belonging to the stockholder who is to supply that parcel, bears to the aggregate quantity of the stock belonging to all the stockholders. This proposition, I think I may safely say, is entirely *consistent* with the words of the section. It does not the least violence to any of those words. It rejects none.

May I not go further, and safely say that this proposition expresses the *natural* and *obvious* meaning of the words? Of the words, "in proportion to" what is the natural and obvious sense? Is it not one which implies the existence of some *proportion*? And is it not the essential characteristic of every proportion to consist of four things, of which the first shall bear to the second, the same relation which the third bears to the fourth? This is the foundation of the "Rule of Three," the great rule in practical arithmetic. To make the words, "in proportion to," equivalent to the words "equal to," is, as it seems to me, to subject the words to some degree of violence.

And if any proportion is implied, the one which is it, there

can, to my eyes, be no mistaking. The property to be supplied by any one stockholder, is to be such a part of that to be supplied by all the stockholders, as the stock of that stockholder of the stock of all the stockholders. As I read the section over, this is the proportion which seems, of its own accord, to rise out of it to my eyes.

And then this proportion works just as you would have it work. It always brings out the right result—the exact one which you seek for. There are, say, bills calling for ultimate redemption, to the extent of \$10,000. Of course, to redeem them, property to the value of \$10,000 is to be supplied by all the stockholders, taken in the lump. This term you know.

The amount of the stock of all—the amount of the stock of each—these terms you also know. The term which you wish to know is, what is the particular amount of this property, which each stockholder is to supply? From the three known quantities, how easy it is to come to know that. As the amount of the shares and the value thereof belonging to all the stockholders, is to the amount and value of the shares belonging to all; so is the amount of property to be supplied by all, to the amount to be supplied by one.

And this same result, the proportion works out, in whatever sense you take the words, “the amount of the shares and the value thereof”—whether you consider the proportion to be one, “to the amount (number) of the shares” and to “the value of the shares” amount and value taken separately, but both taken; or one to the amount of the shares added to the value of the shares; or one to the amount of the shares multiplied into the value of the shares. And it will make no difference whether you estimate the value of the shares to be \$100—\$50—\$10—\$1—each. The fourth term in each of the following proportions will be precisely the same quantity. As the amount and value, at any rate, of the whole stock is to the amount and value, at the same rate of the stock of A, so is the quantity of property to be supplied by all the stockholders to the quantity to be supplied by A. As the amount of the whole stock is to the amount of the stock of A, so is the whole quantity of pro-

erty to be supplied by all the stockholders, to the quantity to be supplied by A. As the *value*, at any rate, of the whole stock is to the *value*, at the same rate, of the stock of A, so is the quantity to be supplied by all, to that to be supplied by A.

Using this proportion, therefore, you may use all the words of the section, and not have to reject any, as you have to do when you say the quantity of property to be contributed by any stockholder, is to be a quantity equal to the *value* of his shares; in which case, you have to reject the words, "*amount of the shares and*".

This proportion, not only thus unlocks this provision of this charter—it equally unlocks the similar provisions of all the other thirty charters in existence. Take the provision in some of those charters, which is most unlike the provision in this, viz: that in which the quantity of property to be supplied by any stockholder, is to be "in proportion to the *number of dollars* issued upon each of the shares" held by him, and *spe*. With such a provision as this, the rule of the majority cannot deal at all.

According to the words of this provision, the proportion will have to be as the number of dollars issued on each of the shares belonging to all the stockholders, is to the number issued on each share belonging to stockholder A, so is the quantity of property to be supplied by all the stockholders to the quantity to be supplied by A. But this proportion is precisely the same as this: as the quantity of stock of all the stockholders is to the quantity of the stock of A, so is the quantity of property to be supplied by all to the quantity to be supplied by A; for the number of dollars issued upon each of all the shares is to all the shares as the number issued upon each of A's shares is to all of A's shares.

This third proposition, then, in connection with the first and second, unlocks all of these provisions in the thirty-one charters, and shows the inside of each provision to present precisely the same face—a face of which the leading feature is, that the quantity of property to be furnished by the whole lot of stockholders, is to be a quantity just sufficient to redeem all the

bills, no odds how many they may be, needing to be redeemed—
and of which the next most important feature is, that of the
aggregate quantity of property thus to be supplied by all
stockholders—the part to be supplied by any one is to be
the whole quantity as his stock is to the whole stock.

Is not this third proposition then true? I think it is.

The other propositions, the fourth, fifth, sixth and seventh,
follow from these three.

The *whole* amount of property to be advanced by *all* of the
stockholders at any one time, is obviously to be no more than
shall be needed at that time; no more than shall be suffi-
cient to redeem the bill or bills then demanding payment.
Admit that there may be other bills outstanding, yet they
may never be presented for payment, and so may never
require any property to be advanced on their account. And
if presented afterwards, they will, equally with those pre-
sented then, be within the rule and be entitled to call for an
advance from the stockholders, sufficient for the payment of
them.

And so it is equally obvious that of this whole amount, thus
to be advanced by all the stockholders at any one time, the part to
be advanced by any one stockholder, at that time, is to be the
whole so to be advanced by all, as his stock is to the stock
of all. He is to pay his part of every bill, as it comes forward
for payment, and the other stockholders are to pay theirs.
Thus the whole bill will be paid—thus all the bills to be paid
will be paid. And this is the end the Legislature had in view.

Will this interpretation of the charter work badly in prac-
tice? I think not—but if it did, it being the one which to my
mind so clearly results from the words and the context of the
charter, I should, myself, have to stick to it. When the words
and the context say one thing, and effects and consequences,
(the understanding of “learned” Courts, or indeed aught else)
say another, a Judge has to go by what the words and the con-
text say. Hence, although a few decisions of other States
were cited in the argument of this case, I have laid them en-
tirely aside, as improper to influence my opinion. Upon a

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Question as to what is the meaning of an Act of the Legislature of Georgia, a decision from another jurisdiction can, at best, only irrelevant—impertinent; and this, even when after resort to the words and context, there may remain some doubt to what is the meaning. Of the cases thus cited, I took one of two; one in *Wendell's Rep.* 24 vol. 478; the other in *Mitchell's Rep.* 526. There may have been some others.

But the practical effect of this interpretation will not be bad—it will be good. The rule it supplies will work easily, and will finish its work as it goes. Is there a bill to be redeemed? let it present itself to any stockholder and say, “sir as the quantity of your stock is to the quantity of all the stock, so is that you have to pay me on this bill to what the other stockholders have to pay me—therefore, pay it to me.” In a minute, the proportional quantity is found, and the stockholder has nothing to do but to pay it. Does he refuse? if so, on what ground? that he does not like the rule—does not understand the rule? Such do not appear to have been the objections in this case. The stockholder, in this case, understood the rule—it was the one he insisted upon. But suppose the stockholder puts his objection to paying, on other grounds, as for example, that there is nothing due by reason of the bills being void, (say) because issued without authority, or extinguished, or barred by the Statute of Limitations, is his refusal to pay to be set down as evidence that *this rule* works badly?

Let there be no obstacle to payment but this rule itself, and payment will go on as fast as it does in any case where payment is to be got out of different debtors. In every such case, it is necessary that creditor and debtor shall have a meeting—at the debt to be paid shall be presented for payment. So the bill-holder will, in like manner, have to be at the trouble to go round to the stockholders and present his bill to each. And which will be, at least, as likely to pay as any other debtors are—or the costs of suit would become a terrible penalty to such as might refuse to pay.

And then, payment thus made to the bill-holder, would, at once blow, settle all rights. The bill-holder will have got only

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what was his due. He will have got nothing as to what another bill-holder may say to him, *divide with me*. And a stockholder will have paid only what he owed. He will have paid no more than his share, and will therefore be in no condition to say to the other stockholders, *contribute to me*. Justice, according to law, will have been completely done. The other rule, which allows any bill-holder to collect the whole of each of his bills out of any stockholder whose stock happens to be equal in value to the amount of the bills, is but the beginning of justice. It puts the bill-holder in a condition to be called upon by all the other bill-holders, for an apportionment of his collection among all; and thus to be left, in reality, no better off than if he had at first only taken from the stockholder such a proportion of each of his bills as that stockholder's stock bore to the whole stock. It puts the stockholder in a condition to be allowed to call on all the other stockholders, to contribute to him the part of the bills, over and above his share, which he has paid. Suppose some of the stockholders to be insolvent, and the solvent ones not liable for enough to redeem all the bills, and this rule set to work to adjust rights, generally, the rights of all concerned? That the rule would give rise to more litigation than it would settle, seems to me apparent—litigation of the most tedious, expensive and difficult sort—litigation between bill-holder and stockholder, bill-holder and bill-holder, stockholder and stockholder. And all, at last, when things should be worked out to their final results, only to give to each bill-holder his *pro rata* share of each stockholder's individual property. In medicine, some remedies, it is said, put into the system three diseases for one they take out; but ought this to be the characteristic of any remedy in law?

Again: this interpretation of mine makes the security for the ultimate redemption of the bills the bank, expand and contract with the bills to be secured. No odds how much the bills may exceed the amount or value of the stock, so they bills lawfully issued, this interpretation makes the security extend to every bill. For the ultimate redemption of every bill, it makes the property of the stockholders liable. The rule

Of the majority makes that property liable for the redemption of bills to an amount equal to the value of the capital stock, and for none beyond that amount. It is true that that rule increases this security as much as possible, by arbitrarily counting the value of the stock at \$100 a share. But to do this, it has, as I conceive, to put a forced meaning on the word value, and even then, the result is a security not sufficient to cover cases contemplated by the charter—those cases in which the amount of bills to be redeemed, exceeds the value of the stock, even when the stock is rated at \$100 a share.

This interpretation presents no opportunities to the stockholder, to prefer one bill-holder to another—gives him no chance to discharge his liability, by taking up bills at their depreciated value—offers him no temptation, therefore, to use means to depreciate the value of the bills; in all which respects, also, it is in contrast with the rule of the majority of the Court.

And these are my reasons for thinking this interpretation to be the true one.

I had, therefore, to agree with the Court below, and to disagree with this Court.

No. 32.—BRIGGS H. MOULTRIE, *et al.* plaintiffs in error, vs. ROBERT B. SMILEY, defendant. B. H. MOULTRIE vs. JOHN NEAL.

[1.] The 8th rule of the Act of Incorporation of the Commercial Bank of Macon provides, that the debts which the corporation shall at any time owe, shall not exceed three times the amount of the stock paid in, over and above the deposits in their vaults; and that in case of excess, the directors under whose administration it shall happen, shall be liable for the same in their individual, natural and private capacities, in an action of debt to be

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brought against them or any of them, their or *any of their heirs, executors or administrators*, in any Court of record in the United States, having competent jurisdiction of the subject, by any creditor of the corporation; and may be prosecuted to judgment and execution, any *condition, or covenant*, or agreement to the contrary, notwithstanding: *Held*, that an action brought, under this rule, against certain directors who were guilty of an over-issue, did not abate by the expiration of the charter, by its own limitation, during the pendency and before the termination of the suit: *Held, further*, that a creditor of the corporation, is entitled to recover only the amount of his debt or demand, and not the entire excess, *in solido*.

Debt, in Bibb Superior Court. Tried before Judge POWERS, November Term, 1854.

This was an action brought to January Term, 1848, by Robert B. Smiley, against Briggs H. Moultrie, Charles Campbell, William B. Johnston and Thaddeus G. Holt. The declaration set out, that the defendants, on the 29th of Sept. 1847, were the directors, and the sole directors, of the Commercial Bank of Macon; that at that date, and from thence continuously, up to the time of bringing this suit, the indebtedness of said bank exceeded three times the amount of the capital stock paid in, over and above the amount of moneys actually deposited in their vaults for safe-keeping; that said excess of indebtedness occurred during the administration of defendants, who have been, since that time, and still are, the directors as aforesaid; that the plaintiff, on said 29th Sept. 1847, was *bona fide* holder of certain bills of said bank, on which he obtained judgments against the bank, in a Justice's Court, on the 13th Nov. 1847, which he still holds unsatisfied.

The declaration further stated, that the aforesaid excess of indebtedness was, at the time it was created, and is, and has been continuously, over 300 dollars, and that returns of *nulla bona* as to said bank, had been regularly entered on his *fi. fas.* by the proper officer. Wherefore, he sought to hold the defendants personally liable for said debt, by virtue of the Statute incorporating said bank.

The 8th rule of the Act of Incorporation of the Commercial Bank of Macon is as follows:

“The total amount of debts which the said corporation shall, at any time owe, whether by bond, bill, note, or other contract, shall not exceed three times the amount of their stock paid in, over and above the amount of moneys actually deposited in their vaults for safe keeping. In case of excess the directors, under whose administration it shall happen, shall be liable for the same in their individual, natural, and private capacities; and an action of debt may, in such case, be brought against them or any of them, or any of their heirs, executors or administrators, in any Court of record in the United States having competent jurisdiction, or either of them, by any creditor or creditors of the said corporation, and may be prosecuted to judgment and execution, any condition, covenant or agreement to the contrary notwithstanding. But this shall not exempt the said corporation, or the lands, tenements, goods and chattels of the same, from being also liable for, and chargeable with such excess, and such of the said directors, who may have been absent when the said excess was contracted or created, or who may have dissented from the resolution or act whereby the same was so contracted or created, shall be liable as other directors for said excess. But such directors may be entitled to recover out of the directors assenting to such excess, by action of debt or on the case, the amount which they may have been compelled to pay”.

The defendant filed plea of the general issue, and at May Term, 1852, he, by leave of the Court, filed the additional plea, that since the last continuance, to wit: on the 1st day of January, 1852, the time limited by the Act of Incorporation of the Commercial Bank of Macon, for the corporate existence of the same, terminated and expired, whereby the said corporation became extinct, and all debts and liabilities due to or from the said corporation became extinct also.

At November Term 1853, the cause being for trial and the Jury impannelled to try the same, plaintiff moved the Court to strike out the pleas of defendants, except the general issue, which motion was sustained and said plea ordered by the Court to be stricken out; which decision is alleged as error.

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brought against them or any of them, their or *any of their heirs, executors or administrators*, in any Court of record in the United States, having competent jurisdiction of the subject, by any creditor of the corporation; and may be prosecuted to judgment and execution, any condition, or covenant or agreement to the contrary, notwithstanding: *Held*, that an action brought, under this rule, against certain directors who were guilty of over-issue, did not abate by the expiration of the charter, by its own limitation, during the pendency and before the termination of the suit: *Held*, further, that a creditor of the corporation, is entitled to recover only the amount of his debt or demand, and not the entire excess, *in solido*.

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corporator, without, much less against, his consent—that all contracts are supposed to be made in reference to the existing laws of the place where they are executed—and that these laws, when contracts are made, are incorporated with and form parts of them—that the charter of the Commercial Bank of Macon was a contract between the people of the State, through the Legislature on the one part, and the stockholders on the other—that the franchise granted, was the consideration for the obligations assumed—that the inhabitants of a municipal corporation are individually liable for the debts of the corporation—and that they are, nevertheless, saved by its dissolution. These, and numerous other positions, stated and enforced with singular ability during this discussion, receive my hearty assent and approbation.

Moreover, I agree that the elementary writers, both in England and in the United States, do every where assert distinctly, that the debts due to and from a corporation, are extinguished by its dissolution, unless prevented by the terms of the charter itself, or by *aliunde* legislation; and that in the Courts of both countries, this doctrine may now be considered too well settled to be overthrown or shaken, and so totally extinguished that the members of the corporation cannot recover or be charged with them, in their natural capacities.

I deem it advisable to examine, at the outset, somewhat minutely, into the origin of this Common Law rule, not for the purpose of questioning its legality, but in order to restrict it in its application to the reason in which it is founded. For *cesante ratione legis, cessat ipsa lex*. And I feel fully warranted in this course, inasmuch as the rule itself has been justly characterized, by the most enlightened tribunals, as odious and iniquitous. Said Mr. Justice *Clayton*, in delivering the opinion of the Supreme Court of Mississippi, in *Nevitt vs. Bank of Port Gibson*, (6 S. & M. 513): “The almost universal prevalence of Statutes, in some shape or other, in the States of this Union, to guard against the consequences of dissolution, proves that they have their foundation deeply imbedded in an innate sense of justice. And the condemnation of the Common Law rule,

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by such men as Kent, Gaston, Tucker, and many others such as they, shows that it is in utter hostility to the spirit of this age. It belongs to the period when men, who could not pay their debts, were imprisoned for life; and when the estates of criminals were confiscated to the government; and it should be consigned to the same tomb with these antiquated barbarisms."

In support of the rule, Judge Blountstone, in his Commentaries, (1 volume, 484) quotes the case of *Edmunds vs. Brown and Sillard* (1 *Levinz*, 287). Mr. Barlow, the author of the text of the treatise on Equity, commonly called by Mr. Foulke's name, because he attached to it his valuable notes, states the same principle in nearly the same language, and cites the same case from *Levinz*, and no other. (1 *Foulk. Eq.* 297.)

Now I am aware of the high authority of Sir Greenwell Leane, as a Reporter. He not only had the commendation of Lords Mansfield and Kenyon, itself the highest praise, but perhaps a still more satisfactory evidence of the value of his reports is shown, by the demand for three editions; and their frequent citation at the Bar and elsewhere. Besides, he reported the decisions of that ablest of Judges and most upright of men, Sir Matthew Hale, who presided in the Courts of Westminster Hall at the close of the 17th and the beginning of the 18th centuries. Could I find the doctrine then broadly asserted in *Levinz*, I should be dumb—I should open not my mouth. But I must say, that no principle of equal magnitude ever rested on so frail a foundation.

What was the case of *Edmunds vs. Brown and Sillard*? It was an action of debt on an obligation of £500. The defendants pleaded *non est factum*; and on the evidence, it appeared that the defendants were two of the principal members of the Company of Woodmongers, then lately dissolved; and that the money was borrowed in the name of the company, and the obligation sealed in the name of the company, and with their seal. The defendants, as was usual, put their names to the obligation. But the obligation was "*nos et universi per presentes nos magistrum et guardianes*," *gc. apl. company de*

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corporator, without, much less against, his consent—that all contracts are supposed to be made in reference to the existing laws of the place where they are executed—and that these laws, when contracts are made, are incorporated with and form parts of them—that the charter of the Commercial Bank of Macon was a contract between the people of the State, through the Legislature on the one part, and the stockholders on the other—that the franchise granted, was the consideration for the obligations assumed—that the inhabitants of a municipal corporation are individually liable for the debts of the corporation—and that they are, nevertheless, saved by its dissolution. These, and numerous other positions, stated and enforced with singular ability during this discussion, receive my hearty assent and approbation.

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I deem it advisable to examine, at the outset, somewhat minutely, into the origin of this Common Law rule, not for the purpose of questioning its legality, but in order to restrict it in its application to the reason in which it is founded. For *cessante ratione legis, cessat ipsa lex*. And I am warranted in this course, inasmuch as the rule itself is characterized, by the most enlightened tribunals. Said Mr. Justice *Clayton*, in the Supreme Court of Mississippi, *Gibson*, (6 S. & M. 512) of Statutes, in some to guard against they have the of justice.

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such men as *Kent*, *Gaston*, *Tucker*, and many others such they, shows that it is in utter hostility to the spirit of this. It belongs to the period when men, who could not pay their debts, were imprisoned for life; and when the estates of animals were confiscated to the government; and it should be assigned to the same tomb with these antiquated barbarisms." In support of the rule, Judge *Blackstone*, in his *Commentaries*, (1 volume, 484) quotes the case of *Edmund vs. Brunson and Ward* (1 *Levinz*, 287.) Mr. *Barlow*, the author of the text: the treatise on Equity, commonly called by Mr. *Furthmeyer*: me, because he attached to it his valuable notes, states the same principle in nearly the same language, and cites *Edmund vs. Brunson* from *Levinz*, and no other. (1 *Ford's Eq. Rep.*,)

Now I am aware of the high authority of Sir *James Mackintosh*, as a Reporter. He not only had the commentaries of *Lord Mansfield* and *Kempson*, itself the highest authority, supported by a still more satisfactory evidence of the antiquity of the rule is shown, by the demand for these citations in the frequent citations at the Bar and elsewhere. *Blackstone*, however, in the decisions of that ablest of Judges, Sir *Matthew Hale*, who presided at the *Exchequer* Hall at the close of the *17th* and *18th* centuries. Could I find the rule in *Blackstone*, III, and in *Levinz*, I should be bound to follow it. The but I must say, that no principle is more firmly established on so frail a foundation as to be preferred.

What was the principle of the Ancient Roman law? *Juris asylum, et doc-* trine! to his late Commentaries as a remarkable fact, that of *Honorius*, a period of about 100 years by the Civil Law; and here some of the most eminent of those afterwards incorporated into the And among these *Justinian*, occasionally, too, Mr. *Blackstone* adds

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Woodmongers teneri, &c.; and the obligation was endorsed *sigillat et deliberat in presentia, &c.* and attested.

The company being dissolved, the action was brought against the defendants, intending to charge them in their private capacities. But it was ruled that on the above state of facts, this could not be. On which the plaintiff was non-suited.

It is needless to suggest, by way of commentary, what will readily occur to every legal mind—that in an action of debt on the bond, on the plea of *non est factum*, this result was inevitable. The evidence shewed that the corporation executed the bond, and not the individual members who sealed the obligation in the name of the company, adding also their own signatures. There was no pretence for charging the individual members at law, upon the contract, if they had authority to execute the obligation in behalf of the corporation; although without such authority they might have rendered themselves liable as upon their own contract. And yet, this is the case cited by Judge *Blackstone*, Mr. *Fonblaque*, and most of the elementary writers, English and American, as the leading, if not the only authority, that on the dissolution of a corporation, its debts are extinguished, and that for their recovery, there is no remedy at Law or in Equity; and for the addendum or amplification of the doctrine by Chancellor *Kent*, that “neither the stockholders nor directors or trustees of the corporation, can recover the corporate debts or be charged with them in their natural capacity,” see 2 vol. *Com. 5th edit.* 307. The case in *Levinz*; it is quite clear, involves no such principle.

Judge *Story* has been criticized with no little asperity in the course of the argument, for having stated that upon the dissolution of a corporation its contracts are not thereby extinguished: but the creditors may enforce their claims against any property belonging to the corporation, which had not passed into the hands of a *bona fide* purchaser. (2 *Eq. Jur.* 688, §1252.) And for relying on *Mumma vs. The Potomac Company* (8 *Peters* 281) as authority for his doctrine.

In all frankness, I must say our cis-Atlantic commentator is far better sustained by the case in *Peters*, for the *dictum* in

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This Equity Jurisprudence,—a *dictum* pregnant with the purest equity, than is his great trans-Atlantic predecessor, in prescribing the rule which he has in relation to defunct corporations, upon the precedent in *Levinz*.

Judge *Blackstone* was more fortunate, when he planted himself upon the Civil Law, as the foundation of this doctrine. After stating the rule he adds, "agreeable to that maxim of the Civil Law—*si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent*, (1 *Black. Com.* 484,) citing *ff.* (that is, the *Digest* or *Pandects*, for these two are convertible terms,) 3, 4, 7, viz: that which is due to a corporation at large and collectively, is not due to the particular members of such corporation, and cannot be recovered by them in their separate capacities; so, the particular members thereof may not be sued for the debts of such corporation, collectively.

This maxim, which stands detached in the original text, (page 105,) and is no where else to be found in the *corpus juris civilis* or body of the Roman Law, is attributed to *Ulpian*, who was a member of the Imperial Council under *Alexander Severus*; the authority of his legal opinions, together with those of *Papinian*, *Paulus*, *Gaius* and *Modestus*, were confirmed by a decree of the Emperor *Valentinian III*, and were alone permitted to be cited in the Courts of Justice. The opinion of the majority of the five were to govern; and in case of disagreement, the opinion of *Papinian* was to be preferred. He, says *Henecius*, in his History of the Ancient Roman Jurisprudence, was every where called, *Juris asyllum, et doctrinæ legalis thesaurus*. Envious distinction!

Mr. *Phillimore*, in the preface to his late Commentaries upon International Law, states it as a remarkable fact, that from the reign of *Claudius* to that of *Honorius*, a period of about 360 years, England was governed by the Civil Law; and her judgment seats were filled by some of the most eminent of those lawyers, whose opinions were afterwards incorporated into the Justinian Compilations. And among these were *Papinian*, *Paulus* and *Ulpian*. Occasionally, too, Mr. *Phillimore* adds

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some maxims of the Roman Law, admitted either from the intrinsic merit or through the influence of the Clergy, enriched the then meagre system of the English Law.

Thus, then, we trace this maxim to Judge Ulpian of the British Bench. Whether the maxim which has caused this digression be one of those which was incorporated into the law, from its "intrinsic merit", I will not undertake to say. It may furnish, at any rate, a sufficient explanation why the corporators could not be made individually liable in an action of debt or any other action, at Law, upon the contracts of the corporation; at least, under the technical rules of pleading, as they formerly stood.

With a single remark, I will dismiss this branch of the investigation. It will be perceived that the ground now urged with so much earnestness, for the maintenance of this ancient rule of the Common Law, had nothing to do in its establishment, namely: the hardship and injustice of making the corporators liable, in their natural capacity, to creditors, after they had lost the power of collecting their debts. Neither the decision in *Levinz* nor the maxim of the Civil Law, allude to any such motive. Both rest upon principles quite different, and purely technical.

I next propose to analyze the rule itself, and to consider its several parts, with a view to a clearer comprehension of its true import and extent.

And 1st. As to lands and tenements. Upon the dissolution of the corporation, these revert to the person, or his heirs, who granted them. This doctrine is laid down as law in *Rolle's Abridgment*, (*London Edition*,) 1668, p. 816. And the reason assigned is, that in case of a body politic or incorporate, the fee simple vested in their politic or incorporate capacity, created by the policy of man; and therefore, the law doth annex a condition, in Law, to every such gift or grant, that if such body politic or incorporate be dissolved, that the donor or grantor shall re-enter, for that the cause of the gift or the grant faileth. (1 *Co. Litt. by Thomas*, 190.) The grant is only during the life of the corporation, which may endure for

over; but when that life is determined by dissolution, the grantor takes it back by reversion, as in case of every other grant for life.

There is but little in the Books that contradicts or questions his doctrine; and the cases that look a different way, maintain that the lands would escheat. They will be found collected in 1 *Vol. of Co. Litt. by Thomas*, 195, note 7. This branch of the rule may have but little, if any thing to do with the present question. It may become a matter of some interest, upon the expiration of our various rail-road charters, should that contingency ever arise. It ought, and I apprehend will be, provided for by legislation in the meantime.

2dly. As to what becomes of the goods and chattels. It is a little remarkable, that the standard books are almost silent upon this subject. In the argument of the case of *Colchester vs. Seaber*, (3 Burr. 1866,) it was alleged by Sir *Fletcher Norton*, and apparently acquiesced in by the Court, that the goods and chattels go to the Crown. Mr. *Kyd*, who has collected most of the cases on corporations, concludes his remarks on the effect of dissolution, in these words: "what becomes of the personal estate, is perhaps not decided; but probably it vests in the Crown". (2 *Kyd on Cor.* 516.)

3dly. As to the rights and credits of an aggregate corporation. They are necessarily lost. Why? Because there is no one in existence who can claim or control them. The artificial person is dead and left no representative behind; lands and goods do not perish by the dissolution of the corporation. They have still a visible, tangible being, and may become the subject of possession or occupancy, by some body. Not so with debts. Why? They cannot exist without an obligor and an obligee—a promisor and promisee—a payer and payee. And upon the death of either one of these necessary parties, without the possibility of a representative, the obligation, or promise, or debt, is said to be extinguished. Or in other and more appropriate language, it *abates*; and for the reason here assigned and for none other. And such is the language of all the Courts, when treating of this subject.



I propose to consider now the true meaning of the word *extinguished*, when used in this connection.

I am not ignorant of its etymological definition. Lord Coke, "the Hercules of the Law", who has written so much, has furnished this also: "Extinct", he says, "cometh of the verb *extinguere*, to destroy or cut off". (*Co. Litt.* 1. vol. by Thomas, 464.). But the proper inquiry is, what is its *legal* signification, when applied to the debts, to and from a defunct corporation?

I have said, elsewhere, that the only idea intended to be conveyed was, that the debts were uncollectable, for want of proper parties to sue and be sued. Is this reason "*imaginative*", as it has been pronounced? If so, I am happy to know that I am not responsible for the fiction. Mr. Chief Justice Sharkey, in delivering the opinion of the Supreme Court of Mississippi, in the case of the *Commercial Bank of Natchez vs. Chambers et al.* (8 S. & M. 9,) says: "it was said in argument, with much plausibility, that even without the interposition of the Legislature, the debts due to and from the bank would have survived its dissolution. That these commercial corporations should be regarded as partnerships, and the fund or property owned by them—a trust fund, which Equity would appropriate to the payment of their debts. The current of decisions seems to have fallen into a different channel; and it may now be regarded as the settled doctrine, that on the dissolution of a banking corporation, the debts due to and from it are extinguished. *Not by any implied condition in the contracts, but from necessity, because there is no person in whose favor, or against whom they can be enforced*". (p. 47.)

This "*imaginative*" reason for the rule, then, seems to have impressed itself upon other Courts. Indeed, it was the reason assigned for the rule in the *Bishop of Rochester's case*, decided in the 38th of Queen Elizabeth, the earliest reported case which I have found upon the subject, and has been recognized and repeated in all the subsequent adjudications, from that day to this.

It will not do, I apprehend, to make departure from our

own variable opinions, the measure of absurdity in others. This fiction is a "fixed fact". At any rate, I shall adhere to it until some other and better reason is assigned as the foundation of the rule.

And notwithstanding some little verbal refinement, the learned Chief Justice who delivered the opinion of the Court in *Coulter et al. vs. Robertson*, (2 ~~Cook~~ R. 322-3,) arrives at the same conclusion with his distinguished predecessor, as to the reason of this rule.

How wide is the difference in the meaning of the word extinguishment, when applied to an obligation or debt which is irrecoverably lost for the want of a remedy to enforce it, viz: proper parties to sue and be sued; and an obligation or debt which has been discharged by performance or payment.

Sed satius est petere fontes, quam sectare rivulos.

With this conviction on my mind, I have searched with painful laboriousness, and by the aid of experts, better versed than myself in translating unknown tongues and deciphering black-letter lore, the fountain heads of the law, in order to satisfy myself as to the sense in which the term extinguishment is to be understood, in connection with corporations; I have examined the Posthumous Publication of Brooke, "*Lq. Graunde Abridgment*", (London Edition, 1576,) which contains, as all subsequent compilations do, a chapter upon "Extinguishment". The author cites his cases from *Fitzherbert's Abridgment*, and from the records of the Year Books to which he had access, and is admitted by Mr. Reeves, Chancellor Kent and other annotators, to have reported them with great care and accuracy; I have continued the search through *Coke on Littleton*, (2d London Edition, 1629); through *Rolle's Abridgment*, (London Edition, 1668); through *Viner*, (2d London Edition, 1791-94,) who makes *Rolle's Abridgment* the basis of his, and who spent nearly fifty years upon his work—the most voluminous production of any single individual in the whole bibliography of the Common Law, and which Judge Story characterizes as "vast Index of the Law". And thus, pursu-

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ing this tract, I have traveled down to the last American edition of *Bacon's Abridgment*, by *Bauvier*. It will be found that these authors reiterate, pretty much, the same dicta, and cite the same cases in illustration of them. And the result of the whole is, as deducible from these and all kindred and contemporary sources, that the term *extinguishment* has, in the law, no fixed, uniform and universal meaning, but varies with the subject-matter to which it is applied. And that the words, *merger*, *suspension* and *abatement*, would, in many instances where *extinguishment* is used, much more accurately and felicitously express the idea intended to be conveyed. In support of this conclusion, I had selected numerous examples which I designed to have embodied in this opinion; but fearing that the benefit to be derived from this addition would not compensate for the inordinate length to which this opinion is likely to be extended, I have resolved to omit them; and in lieu thereof, I will confine what I have to say to the title, *extinguishment*, in *Bacon*. And this I do the more willingly, as the author has introduced or referred to most that is worthy of being preserved from the preceding abridgments, as well as most other standard works upon this head of the law. At the close of the opinion of the Supreme Court of Delaware, in the case of the *Commercial Bank against Lockwood*, (2 *Harrington*, 1st case,) it is stated that at Common Law, if a creditor appoints his debtor his executor, the debt is *extinguished*; and *Bacon* is cited as authority for the doctrine. And this reference is made to explain what is meant by the *extinguishment* of the debts of a dead corporation. It will be found on p. 150, of the 4th volume of the new edition. Why extinguished? "*For in this case*," says *Bacon*, "*he cannot sue himself*." And I would suggest, that when the debtor appoints his creditor his executor, the debt may be said to be *extinguished*, in the same sense and for the same reason assigned by *Bacon*. The history of the rule, as to the appointment, by the creditor, of his debtor to be executor, operating as an extinguishment of the debt, is instructive and admonitory. Like the rule of the Common Law, relating to corporations, it stood, for its support,

upon the old authorities. (*Co. Litt.* 264, b. note 1. *Sir John Needham's Case*, 8 *Rep.* 186. *Hobart*, 10. *Cro. Car.* 372.)

By and by, the Courts begin to intimate, and very properly, that no such rule should ever have existed; until finally, they have created so many exceptions to it, and leaned so far in restricting its generality, as almost amounts to its abrogation.

And consequently, under the adjudications, both in England and in this country, the *debt*, now, is never considered as lost; but the remedy, only, as gone; and the money due is considered as assets in the hands of the executor.

In *Simmons vs. Guthridge*, (13 *Ves.* 262,) Lord Eldon said, "In every case of a decree against an executor, an interrogatory ought to be put by the master, whether he is charged with being a debtor, as in *Sadlier vs. Sir Stephen Lushington*; and is he a debtor to the estate or not; and if he is, that debt is assets".

So, in the leading case of *Eagleton & Coventry vs. Kingston*, (8 *Ves.* 438,) the same learned Chancellor remarked: "The principle in this Court is, that where a suit is instituted for the administration of the effects of a testator, the executor, if a debtor to the estate, is bound to deal with himself exactly as he would with any other debtor. Therefore, if the money is put upon personal security; and much more, if there is no security, as the Court would charge an executor for not calling it in; so, they would take it from him, who is both executor and debtor, and place it with the Accountant General, till the proportion in the bulk of the property coming to him can be ascertained".

By sifting this doctrine thoroughly, it will be found that the apparent confusion and contradiction to be met with respecting it, has been the result of not discriminating between the extinction of the thing itself, and the extinction of the action for its recovery. In the case of *Woodward vs. Lord Borey*, (*Plowden*, 186,) as early as 4 and 5 *Philip and Mary*, the distinction was clearly taken, that by making the debtor executor, "notwithstanding the action for the duty was gone, and

it was a chose in action, yet the duty is not extinguished, but it shall be assets in the executor's hands".

Thus we see how and why it is that debts are said to be extinguished, by making debtors executors. Will it be pretended that this mode of extinguishment, is similar in its nature to that which is effected by the payment of the debt?

But let us return to *Bacon* for further illustrations of the meaning of extinguishment.

"When one, indebted to the estate of a lunatic by specialty, is appointed committee of his estate, and the specialty is transferred to and received by him as a committee, *the debt is extinguished*; and the securities to his bond, as committee, are liable for so much money received by him". (4 *Ba. Abr.* 150—citing *Joyner vs. Cooper*, 2 *Bailey's R.* 199, which fully sustains the text.)

"So, where the obligor marries the obligee, this is said to be an *extinguishment of the debt*; for by the intermarriage, they became one person, and cannot sue each other". (*Ib. Bacon.*)

This doctrine of *extinguishment of debts*, and the reason upon which it is founded, "*imaginative*" though it may be, seem to be treated, every where, as inseparable as cause and effect.

The principle of this last *dictum* is as old as the Year Books. It is thus stated by *Brooke*: "If a man makes a bond to a *feme sole*, and afterwards marries her and they are divorced, the woman shall have her action upon the bond. Objected, that it was at one time *suspended*. *Sed per curiam*. She shall have all her goods, the property in which can be known, and which have not been destroyed or sold during the coverture": Citing 26 *Hen. 8, c. 7. Brooke. Ex. & Sus.* 814.)

Thus, it will be perceived that *Brooke* and *Bacon*, use *suspension* and *extinguishment*, to signify the same thing—as convertible terms. In this instance, the former is obviously the more proper of the two.

This case shows further, that notwithstanding a debt may be *extinguished*, in the sense in which this term is used in the

law as applicable to certain rights; that still, the obligation survives and may be enforced.

In the late case of *Shields vs. Yonge, Superintendent, &c.* (15 Ga. R. 849,) my brother BENNING has very conclusively vindicated another term of the law, from a like misapprehension. It is the word *merger*. In all the authorities upon Criminal Law, it is laid down, that if a felony is committed, the private injury is merged, or drowned, or swallowed up in the public wrong; whereas, my learned colleague shows conclusively, that the private injury is merely *suspended* until the crime is prosecuted. At Common Law, a forfeiture of all that the offender had, following the felony, there was nothing left out of which reparation could be made. And in this sense, and in this only, was the right, itself, said to be lost or cut off. And that if any thing can be found, out of which compensation can be made, after the public injury is avenged, redress might be had.

The two cases are, in principle, entirely parallel.

I am here reminded of a familiar analogy, drawn by the senior Counsel in this case, in support of his understanding of the doctrine of extinguishment. It is somewhat out of the line of investigation I had arranged for myself; nevertheless, I will take notice of it here, lest it should escape me.

He says that the rule which he seeks to have applied to dissolved corporations is not new in the law. That when a man marries, he takes his wife and her property with the burden of her debts. In other words, the law raises an implied promise to pay all her debts. And for this promise, considers the marriage a sufficient consideration. That the property adds nothing to the consideration, for he is equally liable, if she have no property. But how long does this promise and liability continue? during the time the marriage, which was the consideration, lasts and no longer. If the creditor of the wife, *dum sola*, neglects to collect his debt during the coverture, the debt is lost. He cannot collect it of the husband if he survives: nor can he collect it of his representative if she survive him.

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And more than that, if she carry to him a large property, he has it all; and by her death, it is freed of the burden of her debts, which the marriage had imposed.

Now the inference is; that when the franchise is lost by the expiration of the charter, and there being no personal liability imposed on the directors at Common Law, it necessarily can only arise under the charter, and formed a part of the contract; and that being an entirety, and the liability not having been enforced during the existence of the bank, the 8th fundamental rule under which the action was commenced, must abide the fate of the rest of the charter, and perish with it, unless there had been some stipulation inserted that this clause should outlive the residue, and that the directors should remain individually responsible, after the demise of the corporation.

The strict rule of law resulting from the contract of marriage, is correctly stated, with some qualifications. It is a strict rule of the law which casts upon the husband, during coverture, all the obligations of the wife; and by the same strict rule of law, he is discharged after the coverture ceases, by the death of the wife; and as a set-off against the hardship, that the husband shall be answerable for the debts of the wife, when he receives nothing from her, a husband may receive with the wife an estate worth a million, yet if he happens not to be sued during the coverture, he is not liable. The latter is viewed as a recompense for the hazard he runs in marrying.

It is conceded that the law is thus written, and that it is competent for the Legislature, alone, to alter it. Neither Courts of Law or Equity can disturb it.

But there are some qualifications of this rule, which it will become important to notice, as will be discovered during the progress of this opinion. The husband is liable, not as the debtor, but as husband. It is still the debt of the wife, and if she survive him, she continues personally liable for it. And this is not all—not only do the *choses in action*, which belonged to the wife, *dum sola*, and which were not reduced to possession during the coverture, survive to her upon the death of the husband: but if, at her death, she leave behind her *any choses*

in action, these, although they belong to the husband as her representative, are, nevertheless, to be considered as assets, in respect of which he will be chargeable with her debts. (*Fitzherbert*, 121. 3 P. Wms. 409. *Cas. Tem. Tal.* 173.)

I propose now to review the cases relied on in the argument, and which it is insisted by Counsel, are in contradiction to the idea that extinguishment, as used in the Common Law rule, respecting defunct corporations, results from the disability to sue and be sued.

Some of these authorities are not new. They were employed before the Courts of Mississippi, where these bank questions have undergone a more thorough discussion than any where else. To my mind, they are perfectly reconcilable with the position which I occupy.

What was the case of the *Commercial Bank vs. Lockwood's Administrator*, (2 *Harrington's Delaware Rep.* 1.) This bank charter was obtained in 1812, and was to continue till September, 1822. In February, 1822, its charter was extended till March, 1824. In January, 1824, it was extended till March, 1827; and in January, 1827, to March, 1830; and it was declared that it should continue until that time, and no longer. March 1830 passed without any further extension of the charter, when the corporation became, of course, dissolved. And in this condition it remained, till March, 1832, when the Legislature passed an Act to revive the defunct bank, and to re-invest it "with all the rights, powers and privileges it theretofore had". The bank, subsequent to this period, attempted to revive, by *scire facias*, a judgment obtained against Lockwood in 1827. But the Court held that it was not the intention of the Legislature to revive the debts due to and from the Bank. "And the Court, with a good deal of parade", says Judge Clayton, in *Nevitt vs. Bank of Port Gibson*, "go on to say, that if such had been the intention of the Legislature, it would have been unconstitutional."

Whether, when a corporation is once dissolved, it cannot, by a subsequent special law, be revived so as to revive the debts due to and from it, is a mooted point. The weight of author-

ity, I grant, is in favor of the negative of this proposition. But I am inclined to think, that upon principle, this power can be maintained. *Bishop of Rochester's* case, and *Edmonds. vs. Brown and Sillard*, already noticed, and indeed, so far as my researches have extended, the earlier cases are that way. And if *Colchester vs. Seaber*, decided unanimously by the *King's Bench*, with Lord *Mansfield* at its head, in 1766, about the period of our Adopting Statute, be law, such would seem to be the law of this State, however this case and the doctrine which it holds, may have been questioned or over-ruled elsewhere.

The facts stated in this case, show that the bond sued on was given to a corporation consisting of three parts: That one of these vital, integral parts had become extinct, so that the corporation could not, by any power of its own, under its charter or constitution, be re-animated. And this, in point of law, amounts to a dissolution. (*Grant on Corporations*, top p. 314.) But the Court held, that notwithstanding the corporation had been disabled from acting from 1740 to 1763, and was without the power of self-renewal, still, that by the grant and acceptance of the new charter, the old corporation was revived, so as to collect the debt. (3 *Burrow's R.* 281.)

It is admitted that natural and artificial persons stand upon the same footing in this respect; and that if a natural person dies without the possibility of a legal representative, in being or expectancy, the debts due to and from him would be as totally extinguished as those of a dead corporation. Suppose, that on the death of a natural, as well as of an artificial person, all debts due by that natural person were declared, by law, to be extinguished; and that by a miracle, as was the case with Lazarus, the deceased debtor and creditor was re-animated—what would become of the liabilities to and from the temporary decedent? would they not be resuscitated, notwithstanding the vital spark had been quenched for three days, and corruption had already commenced its work? So it is with an artificial person. Their rights and credits are extinguished by dissolution. They fall, necessarily, from the lifeless hands which are no longer able to grasp them. Still, it would seem to be com-

petent for the omnipotence of the Legislature to breathe into the corporation corpse the breath of life, and restore it to its equal existence. At any rate, I concur fully with the Supreme Court of Pennsylvania, in the case of *Bleakney and another vs. The Farmer's and Mechanic's Bank of Greencastle* (17 Serg. and Rawle 64), that such an Act of the Legislature "would work no injustice, infringe no man's rights, and impair no contract."

But this point, however grave in itself, has no bearing upon the question before the Court; and I have glanced at it, out of respect to the learned Counsel who have adduced the precedent from Delaware, where it was determined. I will endeavor to dispose of the remaining cases more briefly.

The point decided in *Butler vs. Palmer* (1 Hill's N. Y. Rep. 124) was simply this: That it is competent for the Legislature to pass an Act, limiting the time within which a mortgage lien might be redeemed; and that the right was gone, unless enforced within the time limited; and that all inchoate rights derived under the law, became extinct by its repeal or expiration. Had the Statute of New York attempted to take away the existing right of redemption, absolutely, or incumbered it with conditions that would have rendered it useless; or had the rights, acquired under the existing law, have been perfected far enough to stand independent of the Act, and the effort had been made by the Legislature to interfere with them, the Courts would not have felt themselves bound to give it effect. *Bronson vs. Kingie et al.* (1 Howard's S. C. Rep. 320) and *McCracken vs. Hayward*, (2 Ibid 608) establish these principles.

Coulter et al. vs. Robertson (2 Cushman's Rep. 321) is another authority relied on with emphasis, by one of the learned Counsel who have argued this cause. There, a trustee of a dissolved bank was appointed by Statute to collect funds sufficient to pay all the debts of said bank; when that was done, the Court held that his office was performed; and that his rights and powers as trustee were at an end; and that he could not collect for the purpose of distribution among the stockholders: and that any debtor might defend himself, successfully, against a suit at the instance of the trustee, by pleading and

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proving that the whole of the indebtedness of the dissolved bank had been discharged.

I am content that this decision shall stand for as much as it is worth, without note or comment.

In *Paschall vs. Whitsett*, (11 Ala. Rep. N. S. 472,) it was held that the stockholder of a corporation was not liable to the process of garnishment, under the Act of 1841, of the State of Alabama, at the suit of its creditor, after the dissolution of the corporate body. By that Act, the plaintiff, in a judgment against a corporation, "is entitled to the rights and benefits of all the laws now in force, regulating the issuance of garnishments". And again, upon an affidavit being made as directed, a garnishment is required to issue, summoning the "garnishee to answer what he is indebted as stockholder or otherwise". Further, "the stockholders of any incorporated company shall be liable, respectively, to the creditors of such company, for the amount of stock subscribed by them and unpaid, in character of debtors to such corporations; and such liability may be enforced by garnishment," &c. (*Clay's Digest*, 260-1.)

The point of the decision under the Statute was, that no one could be said to be the debtor of a corporation after dissolution; and that the process of garnishment would not lie, where there was no subsisting indebtedness, at the time.

The case of *Lindell vs. Benton & Kennedy*, (6 Missouri R. 364,) is a direct authority to the contrary. It was there held that if a garnishment issued by the creditor of a bank against its debtor, be served, such debtor is bound to answer, notwithstanding the expiration of the charter before judgment on the garnishment.

While Mr. Justice *Thacher*, (than whom no Judge has been more strenuous in enforcing the Common Law rule, in all its stringency,) in his dissenting opinion on the re-argument of *Nevitt vs. Bank of Port Gibson*, does not controvert this decision, he puts it upon the peculiar phraseology of the Statute of Missouri, which provides, that "from the time of serving process of garnishment, all moneys and effects due and owing, payable or belonging to such corporation, shall be bound until

the judgment against the corporation is satisfied". (*Digest of 1835*, p. 126.) Under this Act, he considered this a case of judicial assignment of property and credits belonging to the bank, which assignment, by service of the garnishment, took place prior to the dissolution.

I believe it is not denied but that *choses in action*, assigned by a corporation, may be recovered by the assignee, notwithstanding the dissolution of the corporation. (*The Bank of Alexandria vs. Patton and others*, 1 *Robinson's Va. Rep.* 499. *May et al. vs. The State Bank of N. Carolina*, 2 *Ib.* 56.) Whether the same effect will be given to an assignment, by operation of law, I am not prepared to say.

But according to the application of the Common Law rule, as now contended for and as adjudicated in Alabama, in *Whitsett's case*, what signified it that Lindell was the judgment creditor of the bank, and the garnisher of Benton and Kennedy, who were the debtors of the bank before the charter expired? There being no corporation in existence, at the time when the defendants were called on to answer, the ground taken is, that no such right had vested in the creditor as would not be extinguished by the expiration—by limitation of the charter.

I would invite attention to the fact, that the Court in Missouri refused the motion to discharge the garnishees, on the ground that the garnishment was not a suit between the bank and the garnishees, the interest of the bank having been *vested* by virtue of the Statute, previous to the expiration of its charter, in Lindell, the plaintiff in garnishment. *How vested* will be seen by the terms of the Act which I have quoted.

White vs. Campbell et al. (5 *Humphries' R.* 38,) is another case relied on by Counsel for the plaintiffs in error, and affords a striking illustration of the *enlarged* statement of the Common Law rule, by Chancellor *Kent*, that the debts due to and from a corporation *civiliter mortuus*, are so totally extinguished that neither the stockholders, nor the directors or *trustees* of the corporation, can recover these debts or be charged with them.

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On the 19th of January, 1844, Campbell executed his note for the sum of \$3400 to the president, directors and company of the Bank of the State of Tennessee; to secure the payment of which, he, on the same day, executed a deed of conveyance, in trust, to the premises in controversy, to one Cummings. On the 19th of February, 1844, White obtained a judgment in the Circuit Court of Knox County, against Campbell, for the sum of \$2500, and cost of suit; upon which, execution was issued and levied upon the real estate contained in the deed of trust. The charter of the incorporation of the president, directors and company of the Bank of the State of Tennessee expired on the 20th day of November, 1841, and White filed his bill to have the deed of trust set aside.

Turley, J. delivering the opinion of the Court says: "that the Bank of the State of Tennessee was not in existence, at the time the note and deed of trust were executed, is not and cannot be controverted. The necessary consequence is, that both the note and deed of trust, are inoperative and void: the one for want of a payee and the other for the want of a *cestui que trust*". And citing the rule as laid down by Chancellor *Kent*, the learned Judge adds: "these principles would prevent a recovery of the debt intended to be secured by the deed of trust, even if it had been executed before the expiration of the charter—a *fortiori* will, it having been contracted after."

The Supreme Court of Tennessee understand the rule, with its apparent extension; precisely as we do. Indeed, it can admit of but one construction.

Chancellor *Kent* did not intend to innovate upon the rule, as laid down by Judge *Blackstone*. He simply meant to say, that upon dissolution, corporate rights and liabilities cannot be saved or enforced, by or through the intervention of any of those intermediate agencies who stand in the place of the corporation.

Fox vs. Horah, (1 *Iredell's Eq. R.* 358,) is the only remaining authority which I shall notice. It is one which has been reviewed in the Mississippi Bank cases, and repeatedly pressed, with unabated confidence, upon the consideration of this Court.

In the first place, the Court repeat the rule as found in all the elementary writers, that upon the dissolution of a corporation, unless the Legislature has otherwise directed, its real estate, undisposed of, reverts to the donor or grantor; the personal property, as having no owner, goes to the State for the benefit of the public; and the choses in action, such as debts, &c. become extinct, "because there is then no one to demand the money."

The Legislature of North Carolina had, in the Revised Statutes of 1831, incorporated a provision, directing what proceedings should be had against corporations, in certain cases: but the Court held that the Statute did not apply to cases where the corporation expired by the limitation of its charter, which was the case with the State Bank, at the Salisbury Branch of which Fox's indebtedness was contracted.

The Court further decided, that the note sued on being payable to the cashier of the bank as trustee, for the use and benefit of the bank, by whom it was discounted, gave him the legal title, so as to entitle him to recover it at law; yet, that in Equity, the bank having the sole right to the money, the right to sue became extinct, by the expiration of the charter, before the money was collected.

I propose to make a pretty full analysis of this case, not only on account of the importance attached to it by Counsel; but also because I entertain a profound respect for the distinguished Jurist who delivered the opinion. No man, who has presided in the American Courts, with a solitary exception, perhaps, enjoyed a higher reputation while living; or has left a brighter name to go down, on the page of professional history, to posterity. To him may, with propriety, be applied the beautiful compliment paid by Camden to Edmund Plowden: *Ut in juris Anglicani scientia, de qua scriptis bene meruit facile princeps; ita vita integritate inter homines sub professionis nulli secundus.*

Judge Gaston admits that the questions involved, were not free from difficulty; and that they were then, (1841!) for the

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first time, presented for judicial decision. Certain it was, he said, that *neither the researches of the Court nor those of the bar, had furnished any adjudications which had a direct bearing upon the points.* Hence, he resorted to elementary principles to fix and apply the true doctrine to the case before him. He next reverts to the Common Law rule, as to extinct corporations, citing Lord *Coke* in support of the first branch of it, as to real estate, but none whatever as to the disposition of the goods and chattels, *or choses in action.* He defines the last to be the rights of the corporation to demand money in the hands of the persons by whom it is withheld. That they derive their existence from contracts, or *quasi contracts*, by which the relation of debtor and creditor was created. That when the creditor corporation died, and there was no successor—no representative, the relation of debtor and creditor ceased, and the debt become, necessarily, extinct.

That there could be but little doubt, that if the debt had been contracted directly with the corporation, by name, and the judgment thereon rendered for the corporation, the debt and judgment would have been, to all intents, extinguished by the death of the corporation; and the collection thereof could not have been enforced by any legal process. But that according to the forms of this contract, the cashier, and not the bank, was the legal creditor. As such, he had obtained his judgment, "*which was not extinguished by the death of the corporation, and which he has the undoubted power to collect by legal process.*"

Having stated these propositions, the great question in the case is propounded, is it against conscience in the cashier to collect the debt? The Judge satisfies himself, and what fair mind can gainsay it, that it is, and therefore granted a perpetual injunction to prevent such a result.

The debts of every kind, from, as well as to the bank, were extinguished. The stockholders were under no personal liability. If Horah collected the money, he was not bound; nor could he be compelled to account therefor to any one. He might have kept it for his own use. No respect can be p

a pretended trust, the performance or non-performance of which, is dependent upon the will of the supposed trustee. "If," says the Judge, "the cashier can rightfully collect this money, it is because he has a right to collect it, for his own use. After much consideration, we are of the opinion that he had not a right to collect it for his own benefit."

I shall attempt to show, before concluding this opinion, the application of these cases, to the one at bar.

I had intended dwelling at some length upon the cases of *Colchester vs. Seaber* (3 Burr. 1866); and the *King vs. Patmore* (3 Durn. and East. 199). But I am constantly admonished to be brief. *Quicquid praecipias, esto brevis*. Neither of these English authorities decide any question involved in the present issue. They were both cases of incorporated towns, or municipal corporations, which had failed to continue their succession, by the election of proper officers, and thereby became dormant, if not dead. In the first case, it was held, that the King, by his letters patent, had revived all the rights and powers of the old corporation; and in the second, that the old corporation was so far dissolved as that the Crown could grant a new charter, which would take the place of the old. I must think the task somewhat difficult to reconcile these decisions. I do not feel it incumbent on me to undertake it.

I do not deem it necessary to refer to the distinction between the personal liability of the members of private monied corporations, and public municipal corporations. With respect to the former, we have conceded that no individual responsibility attaches for the corporate debts, though the incorporation may be sued for the recovery of them. But with regard to the inhabitants of a town incorporated by law, and against which no private action will lie, unless given by Statute, each inhabitant is liable to satisfy the debt; still, it can only be reached and recovered through the corporation. And if that be dissolved before judgment, the personal liability of the members is extinguished.

A reference to one or two more authorities will conclude what I have to advance, by way of preliminary remark or intro-

duction to the views which I entertain relative to this particular case.

In *Stearnsen vs. Oliver* (8 Mees. & Welsb. 234) Lord Abinger, Chief Baron said, "It is by no means a consequence of an act of Parliament's expiring, that rights acquired under it, should likewise expire." And Parke, Baron, said, "There is a difference between a temporary statute and statutes which are repealed. With respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction."

"It is a well established rule, that statutes incorporating companies, conferring privileges and professing to give the public certain advantages in return, are to be construed strictly against the corporation, and liberally in favor of the public. *Grant on Corporations* (marginal page 309), citing *Parker's Great Western Railway Company* (7 M. & Gra. 263.)

In this same treatise, marginal page 304, I find the following paragraph, and quote it for as much as it is worth: "The principle has been broadly stated, that a corporation may be dissolved for some purposes, and remain for others." Referring to *Guardians Woodbridge Union vs. Guardian Colnias Union* (18 Law J. (N. S.) Q. B. 133, 134.) To which the author adds, "but the subject, at present, requires judicial illustration." (*Ib.*)

We recur now to the main question propounded at the outset, did the action of debt, brought against the directors, under the 8th rule of the Act of Incorporation of the Commercial Bank of Macon abate, by the expiration of the charter during the pendency, and before the termination of the suit?

Rule 8th provides that "The total amount of the debts which the said corporation shall at any time owe, whether by bond, bill, note or other contract, shall not exceed three times the amount of their stock paid in, over and above the amount of moneys actually deposited in their vaults for safe-keeping; in case of excess, the directors, under whose administration it shall happen, shall be liable for the same, in their individual, natural and private capacities; and an action of debt may, in

such case, be brought against them, or any of them, their or any of their heirs, executors or administrators, in any Court of record in the United States, having competent jurisdiction, or either of them, by any creditor or creditors of the said corporation, and may be prosecuted to judgment or execution, any condition, or covenant, or agreement to the contrary notwithstanding. But this shall not be construed to exempt the said corporation, or the lands, tenements, goods and chattels of the same, from being also liable for and chargeable with the said excess; and such of the said directors who may have been absent, when the said excess was contracted or created, or who may have dissented from the resolution or act, whereby the same was so contracted or created, shall be liable as other directors, for said excess. But such directors may be entitled to recover out of the directors assenting to such excess, by action of debt or on the case, the amount which they may have been compelled to pay." (*Prince's Digest*, 191.)

I am not prepared to say that the directors in this case, who were actually guilty of the mismanagement, would not be *individually* liable to bill-holders, independent of this statutory provision. For it is a maxim of the Common Law, that any one specially injured by the breach of duty in another, shall have his remedy by action. If they are not, it must be because the loss sustained by their misconduct, was the result of mere error, unmixed with negligence or fraud. By the terms of the Statute, even this constitutes no defence for a violation of the charter, in making an over-issue. But I forbear to discuss this point.

And I ask, what rule of the law, taken in all its length and breadth, is impugned, by holding that the personal liability of the directors may be enforced, notwithstanding the expiration of the charter creating it? Who is the obligor and obligee, the promissor and promisee, under this 8th rule? Is it not the directors, under whose administration the excess was committed on the one part, and the bill-holder on the other? What is it to them that the charter of the Commercial Bank of Macon expired on the 1st day of January, 1852? And that from

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and after that time all *corporate* liabilities were extinguished, because there was no longer any corporation creditor to sue, or debtor to be sued? These directors and bill-holders survived and survive in their natural capacities; and it is not necessary, under the charter, for the one to reach and subject the other, through the corporation, as in the case of municipalities. It is true, the charter is not to be "so construed as to exempt the corporation or the lands, tenements, goods and chattels of the corporation from being also liable for and chargeable with the said excess." The Legislature must have considered that these illegal acts of the directors were done by them in their official capacity, and that they must have received the express or implied sanction of the stockholders, and hence should be binding on them—that the illegality attached not to the directors solely, but to the whole corporate body—that they were *in pari delicto* the directors in performing, and the corporators in ratifying, by not repudiating and restraining those illegal acts. *Qui tacit consentire videtur.*

It has been assumed in the argument, that the judgment previously obtained by these creditors against the bank, is discharged; and the lien fixed, by law, upon its assets, released by the dissolution. For the sake of the argument concede this. Does the loss of one of the securities guaranteed by the charter, deprive the creditor of the benefit of the other? A note, protected by mortgage, may be barred by the Statute of Limitations (and this charter is a twenty years' Statute of limitations, *pro hac vice*) in other words, the note is *extinguished*; still, the mortgage lien may be enforced. Where two or more persons are jointly, but not severally liable on a simple contract debt, a judgment obtained against one, is, at Common Law, an extinguishment of the claim on the other debtor. But here the corporation and the directors are severally and not jointly liable; the one in their collective, and the other in their individual character. And yet, it is contended, that the discharge of the debt by operation of law, as to one, is a discharge of both.

No one doubts the power of this and other banks to draw,

accept or endorse bills and promissory notes. Suppose a bill had been drawn by an individual or another bank, and accepted by the Commercial Bank of Macon; and the latter failing at maturity to pay, the paper had been protested, and notice given to the drawer, before the expiration of this charter—would there be any question as to the liability of the drawer? So, if the Macon Bank had been the maker of a negotiable note, which was subsequently endorsed, the liability of the endorser would be indisputable, notwithstanding the expiration of the Macon Bank charter.

The President, Directors and Company of the Middletown Bank vs. Russ and others (3 Conn. Rep. 185) was a case where a manufacturing company became indebted to the plaintiffs on notes made by its agent to one Wolcott and others, and by them were endorsed to the Middletown Bank. At maturity, payment was demanded and refused, and notice given to the company and endorsers. I ask, had this manufacturing company, after that, ceased to exist by the efflux of time, would the endorsers have been discharged? And if not in these cases, why should the expiration of this charter, admitting that it extinguished all corporate liability, shield these directors from an action "in their individual, natural and private capacities," which was given against them, and not only them, but their heirs, executors or administrators, and which was authorized to be prosecuted to judgment and execution in any Court of Record in the United States, having competent jurisdiction; and that, too, in despite of "any condition, or covenant, or agreement to the contrary!" So determined were the Legislature to give efficacy to this provision, in restraint of over-banking, that it is expressly enacted that no condition, *in law* or in deed, (and is not the plea here set up, directly in the face of this clause, viz: that you may do this, upon the implied condition that suit is brought during the continuance of the charter,) I say, so resolved were the Legislature to uproot the temptation to this mischief, that not only no condition, but even a "covenant or agreement" between the parties to that effect, shall not arrest this statutory remedy: but the solemn stipula-

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tion between the parties, founded upon a valuable consideration for this purpose, is to be set aside, like gaming and usurious contracts, as against public policy, and declared by the Courts to be null and void.

On the brief of the senior Counsel, I find this definition of the word *extinguishment*: "an annihilation of a collateral thing or subject, in the subject itself, out of which it is derived". It will be found in *Burrill's Law Dictionary*, part I. p. 461. And the author cites *Preston on Merger*, 9. I have before stated, that extinguishment is very often, in the Books, confounded with merger. And this remark is made by Mr. Burrill, himself, immediately following the foregoing definition. And well it might be. His own definition is a proof and illustration of the fact; for by referring to *Preston on merger*, it will be seen that it is there used for the consolidation or union of one estate with another, as where a Prior has an annuity outside of his parsonage, and afterwards purchases the other and can obtain an appropriation of it, the annuity is extinct or merged. (2 *Henry*, 4 ch. 19.) So, if one has a road appendant or common appendant in others' land, and purchases the fee, and afterwards disposes of the fee, there the road or common is extinct forever. (11 *Henry*, 4 ch. 5.)

But it is needless to multiply these cases, which have come down from the Year Books. Grant, if you please, that the extinguishment of the main thing had the effect of extinguishing the incidents growing out of it; still, the rule, when applied even to rights or debts, would not avail these parties; for, *quoad hoc*, they are the body, and the corporation but the limbs. They are the head and front of this offending. This liability has been incurred by their mal-administration of the affairs of the corporation. Their malfeasance or official mismanagement, is the wrong for which this redress is given. An excessive issue was forbidden by the Legislature, and it is for disregarding this inhibition that these suits are instituted. The directors may not, knowingly and intentionally, have violated the express prohibition of the law, in this respect. I know some of them, and they are honorable men—men upon whose escutcheon the

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of dishonor, or even the suspicion of it, never attached; from whatever cause *the acknowledged violation* arose, her from negligence, mistake or any other cause, the effect as to the parties to this suit, is the same. The law will hold them guiltless. The law does not expect nor stipulate infallibility. *Lex non cogit ad impossibilia*. And I thank God that it does not; but when it distinctly forbids a thing to be done, and annexes a certain responsibility for disobedience, its mandate must be respected or the consequences attached to it.

Now, then, to make the definition from Burrill available, it should have been reversed. The legal maxim is—*Accessorium ducit sed sequitur suum principale*. That the incident does not lead, but follows the principal; whereas, here, the extinguishment of the collateral is made to work the extinguishment of the direct liability. In this instance, neither is one, but the one is wholly independent of the other.

Having disposed of the definition, let us consider, for a moment, the analogy from the law regulating the marriage contract. We have seen that if the debt of the wife, contracted before marriage, was not collected during the coverture, it was said to be *extinguished*. Nevertheless, say the authorities, it becomes the debt of the wife and not of the husband, if he died, the debt survived against her. Now we have attempted to show, that this was the debt or default of the directors. One, for reasons, from which the corporation was not exempt, properly it was prosecuted during the existence of the corporation. But as against the directors, who occasioned the injury, should it not survive the legal death of the bank? Just as the debt of the wife survived the legal death of the husband? We must think the analogy makes strongly against the ingenious Counsel who have invoked its aid.

Is there any thing, in the case of *Fox and Horah*, adverse to the conclusion, that the liability of the directors survives the dissolution of this charter, or in conflict with the exposition of the law as hitherto been given by this Court, to the Common Law? *XVI-41*

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Law rule applicable to defunct corporations? If so, then I have studied that case to little purpose. Like all the other precedents adduced from the State Courts, it affirmed, in general terms, the Common Law doctrine, that upon the civil death of a corporation, the debts due to and from it are extinguished. But Judge *Gaston* proceeds—"but according to the terms of the original contract, the plaintiff (Fox) became bound to pay the money to the defendant (Horah). This constituted him, and not the bank, the legal creditor of the plaintiff. As such, he has obtained his judgment, which is *not* extinguished by the death of the corporation; and which he has the *undoubted power to collect by legal process.*"

Surely this portion of the opinion of this eminent Jurist, must have escaped the notice of the lynx-eyed Counsel who have investigated this question with such untiring industry. Because the note was given to Horah, the former cashier of the expired bank, although for the money of the bank, and he having no personal interest in it, this Court held, that being the legal creditor of the borrower, and having obtained his judgment upon this note, as *at Law* he was entitled to do, the debt was "*not extinguished*" by the dissolution of the charter. And that this mere nominal, ostensible holder, had "the undoubted power to collect it by legal process". But the Court, sitting in Chancery, decreed that it was against conscience to tolerate so unjust a proceeding; and consequently, granted an injunction to restrain the judgment.

If this unreal, shadowy and seeming liability from Fox to Horah, and which could have been defeated in this State, even at Law, according to the uniform decisions of this Court, was not *extinguished*, because, on its face, the note was made payable to Horah *as cashier*, although, in fact, due and owing the bank, how can it be claimed, upon the authority of this case, that this primary, direct and personal liability of these directors is cut off—destroyed, by the expiration of this bank charter? And if it be not, is it against conscience, in these creditors, to compel the payment of their demand? Would a Court of Equity find any pretext, here, for interposing to shield these

defendants from the consequences of their own *acknowledged* delinquency?

It would be a waste of time to review, at length, the other cases. *Fox and Horah* is the strongest. And by that, I am willing to have this judgment tested and tried, and if found in hostility to it, pronounced erroneous. In this, as well as in all the other cases, from Alabama, Tennessee and elsewhere, the decision of the Court turned upon the fact, that virtually, the defunct corporation was a party to the litigation; and that being a corporation suit, it must, under the common rule, ~~be~~ But no such issue is involved here. This suit is brought to enforce a distinct, separate and independent undertaking. And in the language of the Court, in the case in *Irish*, "certain it is, that neither our own researches nor those of the Counsel, have furnished any adjudications" which apply to such a case; and maintain, that such a collateral liability is defeated by the civil death of the corporation. After a, ~~thorough~~ examination of the whole range of English and American authorities, ancient and modern, I entertain the utmost confidence that none such can be found. I have searched diligently for the reason upon which the rule of the Common Law is based. I believe that I have stated and applied it correctly.

. But, say Counsel, and this I consider the most plausible view that has been taken of this question, when the charter was dissolved, by its expiration or from any other cause, the entire contract, and every part thereof, was vacated; for the contract being an entirety, it could not be dissolved in part, and still subsist for certain purposes. The State agreed to grant to the stockholders, upon certain precedent conditions, the franchise embodied in the charter, and the stockholders, on their part, agreed, amongst other things, that they would not issue more than three times the amount of the capital stock paid in, over, and above the amount of deposits. That the bank should pay the bills in specie, when presented; and that if any of the stockholders are made directors, they will not be guilty of an over-issue; and if they do, the property and effects of the bank shall be liable; and that in addition to this, the directors would

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be liable, in their persons and property, for said excess; and that it was further mutually understood and agreed, that if the said bank failed to comply, on its part, the charter might be forfeited, and the State might institute proceedings to vacate the contract; and if they were so dissolved, and also upon the expiration of its charter, on the first day of January, 1862, the contract would no longer have any binding force or effect. The real estate belonging to the bank should revert to the grantors—its personal property be seized by the State; and all the debts due to and from it, at that time, should be extinguished.

Now the argument is, that as the stockholders stipulated that as directors, they would be personally responsible for an over-issue; and that part of the contract was obligatory upon them during its existence; yet, it is but fair, just and equitable, that they should be discharged from it, since the rights and privileges guaranteed by the charter, have been annulled by its extinction. That this clause, by which the stockholders are made personally chargeable, is not a super-added stipulation, subsequently entered into by the directors, at the time of their election, but an original item in the contract, as it was ratified between the State and the stockholders. It was a part of the compact and could not survive it; and when the charter expired, this expired with it, just as all the members of the animal body cease to pulsate when the body dies.

This ingenious method of stating the case, is opposed, of course, to every aspect in which we have endeavored to present the transaction, and the law arising out of it. We are called upon to point out the paragraph in this charter, which extends the *individual liability* of the directors, beyond the period fixed by the charter for its own expiration. For all the purposes of this decision, we have conceded that all *corporate* rights and liabilities are extinguished by the dissolution of the bank, on the first of January, 1862. We have attempted to show that this results from the necessity of the case. We have attempted to show, and we think successfully, that no such reason applies to the personal responsibility incurred by

a portion of the stockholders, *as directors*, during the existence of the incorporation; and no authority has been cited, negating this conclusion. . . We insist, therefore, that the burden is upon those who assail our position, to point to the proof in the charter, that this *individual* liability ceases with that of the company, and that such was the intention of the Legislature. We admit that this intention may be inferred, as to the aggregate liability, from the operation of the rule which we have been discussing; and that the contract may be read and interpreted, as though this was inserted in it. But we utterly deny that any such conclusion is to be drawn, so far as the personal accountability of the directors is concerned. Indeed, apart from the legal view of the question, the very contrary is to be presumed, from the fact that the very ground upon which it is contended the private liability terminates, namely: the dissolution and insolvency of the bank is the very contingency contemplated by the Legislature, upon the happening of which the super-added security would seem to be most needed.

But let us examine this case as put by Counsel, a little more closely. It is said that this charter is a contract, to which the Government is one party, and the stockholders are the other. By the terms of the instrument, the Government granted certain privileges to Thomas T. Napier and others, which were to continue till the first day of January, 1852, unless forfeited or voluntarily surrendered before that time. In consideration of this grant for a definite and limited period, the said Thomas T. Napier and the other persons therein named, and all others who might subsequently become stockholders in said company, stipulated, amongst other things, that the debts of the company should, at no time, exceed three times the amount of their stock paid in, over and above the amount of their deposits. And for the fulfillment of this agreement, the stockholders bound themselves in two capacities—one, as members of the corporation, and the other as individual stockholders. As members of the corporation, they agreed that the corporation and the lands, tenements, goods and chattels thereof, should be chargeable for said excess. As individual stockholders,

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they agreed that their persons and property should be pledged and bound in proportion to the value of shares—that each of said stockholders, should hold in the bank, for the ultimate redemption of its bills. And further, that in case an over-issue should be made, whoever of said stockholders should be directors at the time, should be liable in their individual, natural and private capacities for said excess, in an action of debt, to be instituted against them, or any of them, their heirs, executors or administrators, in any Court of Record in the United States having jurisdiction of the matter; and that said suit might be prosecuted to judgment and execution, any condition, or covenant or agreement, to the contrary notwithstanding.

Here, then, are the same persons liable in two different ways for the same debt, created inchoately at least, at the same time, by the same instrument, and upon the same consideration. It is not pretended but that the Government has faithfully kept and performed its part of the contract. And it is agreed by the defendants on the record, that under their administration as directors, there was an over-issue of [bills more than sufficient to cover the amount sued for. It is insisted, however, that because the undertaking of the stockholders, as members of the corporation, that the corporation should be liable, is extinguished by virtue of the Common Law rule, its charter having expired, the individual undertaking must fail also, to which no such rule applies.

It does seem to me, that simply to state this proposition, is to refute it. And that it is founded in neither law or logic.

It could be satisfactorily demonstrated, I think, this was not a contract made between the State of Georgia and a corporation, but one which was entered into between the State and the individuals therein named, who, as the preamble to the charter recites, had already subscribed for the stock in the contemplated bank, and all such persons as might, by assignment of stock or otherwise, become stockholders: whereby, *The Commercial Bank of Macon* was brought into being. But I forbear to enter upon this investigation. Of one thing I entertain no doubt; and that is, that had the stockholders in any of our

railway companies stipulated with the State, that in consideration of the privileges and immunities granted, at the expiration of their charter, the road, with all of its fixtures and equipments, should be transferred to the State; and that for the due execution of this agreement, they bound themselves in their individual, natural and private capacities, in double the value of said property, no Court in the United States would hesitate to coerce a compliance with the contract. "Ah!" it will be said, "in the case supposed, the instrument shows, upon its face, that this part of it was not to be performed until the expiration of the charter". Very true; but so far as these individual obligations are involved, it matters not when they are sought to be enforced, whether before or after dissolution. They rest upon a wholly different footing from that of corporate liabilities, to which the doctrine of the Common Law rule applies.

Again: Suppose one of our railway charters should provide, that for all injuries done to the persons of passengers, by the misconduct of any officer; that said officer, his heirs, executors and administrators should be personally liable to the party aggrieved, in an action of trespass, in any Court in which he might be sued, "any condition, covenant or agreement to the contrary notwithstanding." And that said provision should not be so construed as to exempt the corporation from liability for said trespass. And suppose a passenger should be seriously crippled by the reckless running of the train, on the day before the charter expired; and that in consequence thereof, no suit could be prosecuted against the company; there being no body politic or incorporate, answering to the name, who could be sued, what is there, in this Common Law principle, which would constrain the Court to refuse to entertain an action against the engineer or conductor, by whose mismanagement the damage was inflicted? We apprehend that the dissolution of the company would interpose no difficulty, as to the right of recovery against the offending officer. And so in the case at bar.

Further: Suppose these directors had given their notes to

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these creditors, for the amount of their claims, and the corporation had expired before collection could be made—would this have constituted a good defence, even in Equity, against a recovery upon the notes? If not, then it is not allowable in the case, as it now stands. For it is immaterial, whether the obligation to pay be by express contract or implied, under the Statute. If it would be a good defence, then we should take one step more. Under the 8th rule, while *all* the directors who were in office at the time the excess was committed, are made liable to third persons, it is further enacted, that such of them as were absent at the time, or being present, protested against it, and from whom a recovery may be had, are entitled to go over against their associates, who were actually in fault. Suppose a recovery to have been had, in this very case, before the expiration of the charter, and a suit had been brought by the directors, who were innocent of actual wrong against their colleagues, for re-imbursement, since the expiration of the charter—can it be supposed, for a moment, that the Legislature intended that the expiration of the charter should defeat this right? In the language of Lord *Mansfield*, (3 *Burrows*, 870,) “without an express authority”, and I will add, a legislative intent “too strong to be gotten over, we ought not to determine a case, so much against reason”. And yet, every argument may be urged in favor of the application of the Common Law rule to this case, as to the one under consideration. This is one of the “incidents” that is extinguished with the “principal”—one of the “limbs” that ceases to pulsate when the “body” dies.

The individual stockholders who were directors when this excess was committed, and the corporation, are both principal debtors. I am not sure but that, under all of our bank charters, containing individual liability clauses, that instead of looking upon the stockholders as guarantors or sureties of the company, that both should be deemed principal debtors—and that but for the requirement that the creditor shall first proceed against the corporation, that he might sue either, at his election—and this requirement is no more than applying an equi-

table principle, that the debts should be paid from the joint funds of the associates, rather than from the separate property of any one of them. But as it respects these directors no such principle obtains; and by its omission, the Legislature has manifested their interpretation of the contract, that it is the debt of the individual stockholders, who, as directors, committed the excess; that it attached upon their persons and property the moment the over-issue was made, and might be enforced at any time thereafter, whether the directors remained in office or had gone out—and continued until it was discharged.

Much has been said in the course of the learned and lengthy discussion which this cause has occasioned, as to the hardship of enforcing this personal liability upon the directors, when they have been deprived of the benefits conferred upon the company, by the expiration of their charter. But were the bank still in operation, would these directors have a remedy over against the corporation for re-imbursement? I am inclined to think they would not, for the reasons already suggested. It will be observed, that while under the 8th rule the directors, who may have been absent when the excess was contracted, or who dissented from the resolution creating the same, are entitled to recover out of the directors assenting to such excess, the amount which they may have been compelled to pay, no provision is made for them to have recourse over against the corporation or the other stockholders for contribution.

But, under any circumstances, bill-holders cannot control the matter. They cannot prevent violations of charters—stockholders can. And if the Legislature intended security to any class, it is hardly to be presumed that it would be to those who violated the law or acquiesced in it, whereby these losses are entailed upon the public.

Besides, the stockholders were the proper persons to apply to the Legislature, to intervene and prevent the Common Law principle from attaching and depriving them of the power to collect their assets, and make them available. This duty did not devolve on the creditors; nor should they be chargeable

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with neglect, nor visited with loss for not attending to it. **And** to prevent such consequences, it is the duty of Courts to **be** the most liberal construction upon these charters, and to **stru**gle hard to get away from the Common Law rule, so far creditors are to be prejudiced by it, as did the Supreme Court of Massachusetts, in *Folger vs. Chase*, (18 Pick. R. 63) **and** as have all the Courts of this country where the rights of **cr**editors were to be injuriously affected by its rigid application. *Every decision sustaining the constitutionality of statutes passed to prevent the Common Law rule from attaching to dissolved corporations, is proof of this assertion.*

The charter under consideration is only a part of a great system intended to secure the credit of corporations, by superadding the responsibility of the individual members, to that of the corporation. And after listening patiently to the able and voluminous argument submitted at the hearing, and diligently reviewing the whole case since, I do not feel constrained, by any principle of law or equity, good morals or sound reasoning, to render the judgment of reversal which is asked at our hands by the plaintiffs in error. Indeed, *these* all conduct me to a contrary conclusion. I will merely subjoin, that on the minor points in this case which, with the exception of that as to interest, are mere matters of form, and not of substance; technical and not substantial objections; we *unanimously* affirm the judgment of the Circuit Court. In *Lane vs. Morris*, (10 Ga. R. 162) this Court held that the bill-holder was entitled to claim interest from the stockholder, not from the time that payment was demanded of the bank, nor from the return of *nulla bona* by the Sheriff on the *fi. fa.* against the bank, but only from the time that payment was demanded of the stockholder. We see no reason to lay down a different rule in this suit against the directors; still, this point has not been argued, although made in the bill of exceptions.

I have now gone through this case, and touched upon all the points which appeared to me deserving of consideration. Some portion of what I have here expressed might have been spared; and the consideration of several of the topics may be

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deemed immaterial to the conclusion to which I have come; but as they were introduced into the discussion, I deemed it respectful to give my views concerning them. That there are difficulties connected with them, I freely admit. What subject has no difficulty in this world? What truth, however luminous, that projects no shadow around it? I have written just what I believed, and nothing more nor less. After the most laborious and careful examination, I am satisfied that my construction of this charter is tenable, while the opposite theory is not. And that in no point of view can the defendants escape the liability sought to be fastened upon them.

STARNES, J. concurring.

The main question in these cases, in my opinion, admits of a very simple solution. The difficulty which has arisen, as I think, grows out of an error in applying the Common Law rule, that "upon the dissolution of a corporation, its real estate reverts to the grantor; its personal estate goes to the Crown, (in this country to the State) and its debts are extinguished," to the case made against these plaintiffs in error. That rule does not affect or control these cases, for very plain reasons.

The debt here is sued for as the debt of individuals, and not as the debt of a corporation; and it was the debt of these persons, before the dissolution of that corporation. It is true, that the Commercial Bank of Macon was liable for *all* the bills emitted by it, as well those which were issued in excess, as others; but from the time that excess happened under the administration of these directors, it became *their debt also*, by virtue of a provision in the 8th of the fundamental rules and regulations of the charter issued to said bank. That provision is as follows: "The total amount of the debts which the said corporation shall

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at any time owe, whether by bond, bill, note, or other contract shall not exceed three times the amount of their stock paid over and above the amount of moneys actually deposited in their banks for safe-keeping; in case of excess the directors under whose administration it shall happen, shall be liable for the same, in their individual, natural and private capacities, and an action of debt may, in such case, be brought against them or any of them, their, or any of their heirs, executors or administrators, in any Court of Record in the United States, having competent jurisdiction," &c. The charter further, as if for the sake of explicitness, and to make plain the character of the liability of the corporation, and the directors in case of such excess, provides that "this shall not be construed to exempt the said corporation, or the lands, tenements, goods and chattels of the same, from being *also* liable for, and chargeable with the same excess," &c.

Thus, this regulation of the charter makes that excess, which would otherwise have been the debt of the bank only, the debt of the directors also; and does this in such terms as clearly creates a several, if not a joint and several liability of this corporation and of these directors. And the latter were so made liable, "in their individual, natural and private capacities" *eo instanti*, that the excess happened under their administration.

If the debt, as due by the corporation, has been extinguished, it has not been by *payment*; and what show of reason is there in the proposition, that because the charter of this bank has been forfeited, and *its* debts are in this way extinguished, although this excess has never been paid, yet that no recovery can be had for and on account of it, against these defendants, who were severally and independently liable to pay it? True, the debt may no longer exist against the corporation, because of its dissolution, nor against the members of that corporation *qua* corporators, nor because of their having been corporators, but this affords not even a technical reason, if it have not been paid, why it should not exist against other persons who, by contract, or *quasi* contract, have undertaken, equally with the corporation, and severally, to pay the debt.

I suggest this illustration : We will suppose that the Merchant's Bank of Macon, in this State, for a valuable consideration, draws its check on the Bank of the Republic in New York, in favor of A, citizen of Macon. In due course of trade B agrees to receive this check from A if he will make himself responsible therefor. Whereupon, A transfers it to B, and indorses thereon an agreement to pay the same, as a joint and several maker, waiving all notice, &c. B goes on to New York, presents the check, and is informed that there are no funds in hand to pay it. He returns to seek payment from the drawer, but in the meantime, the charter of the Merchant's Bank has expired, and its debts are extinguished. Will any one venture to hold that the several liability of A, to pay the check, is also extinguished because of such dissolution? If not, it should not be insisted that the liability of the directors, in the cases at bar, was extinguished by the dissolution of the corporation.

. In this view of the subject, all difficulty is obviated (if difficulty there be) growing out of the argument, that a charter is to be regarded as a contract between the stockholders of a corporation and the State; and that when a contract fails, all rights springing out of it must go with it. The right to hold these directors responsible, cannot be said to depend, alone, on the contract between the State and the corporators, but springs out of the statutory liability of these defendants, which, if not *ex contractu*, is *quasi ex contractu*, and was incurred by each director, when this excess happened; he, by accepting the office of director, having agreed to become subject unto the obligations and liabilities which the charter created; one of which was, that he should be held responsible for such excess of issues, as might happen during his administration. *Bullard vs. Bell*, (1. Mason, 292, 293.)

This appears to me a reasonable and just view of the subject, without reference to the *rationale* of the Common Law rule to which I have referred. An examination of the reasons for that rule, however, will strongly sustain the positions I have assumed.

The radical principle on which that rule rests is, simply, that what is due to a corporation, or artificial body, is not due to the natural persons composing it; and when anything is due from such a body, it is not owing by the natural persons constituting it. The same rule prevailed at the Civil Law, and was expressed by the words, *si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent.*" (*ff. 3, 4, 7. Domat Civ. L. Book 2. Tit. 3 Sec. 3. 3 Par. 1452. Angel & A. on Corp. chap. 22, §7.*)

Of course it follows, that when a corporation is dissolved, not having heirs or legal representatives, nor the legal possibility of such, if the power creating it has made no other provision, its debts are no longer due by any one, or to any one; that is to say, there remains no person in being, natural or artificial, responsible for them, or who may collect them, and they must necessarily become extinct. This is all that Sir William Blackstone means to say, in the passage so often cited at the hearing of this case, when he says, "that the debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover or be charged with them in their natural capacities," as is proven by the fact, that he declares this Common Law rule to be "agreeable to that maxim of the Civil Law" which I have quoted above. (1 *Black Com.* 445.) And this is what is meant by the repetition of the doctrine in the other books and cases which were cited by the Counsel for the plaintiffs in error. I will refer to a few of the more prominent of these cases. They must be taken as examples of what is held in the others; for to comment on all would consume too much time and attention.

Let us look, first, to the case of *Fox vs. Horah*, (3 *Ired. Eq. R.* 358) a leading case on this subject, and one concerning which, in the argument, it was said "it could not be distinguished from that at bar, it might be *over-ruled*." There Judge *Gaston* said, "when the creditor corporation died, and there was no successor, no representative, the relation of debtor and creditor ceased, and the debt became necessarily extinct."

Another case, the most recent decision which was brought to the attention of this Court (*Coulter & Richards, Exrs. vs. Robertson, Trustee*, 2 Miss. Cush. 278) and which was relied upon by one of the Counsel for the plaintiffs in error, as exceedingly appropriate to his case, very explicitly and forcibly supports this view of the subject. Ch. J. *Smith*, in that case says, "It may now be regarded as the settled doctrine, that on the dissolution of a banking corporation, the debts due to and from it are extinguished; not by an implied condition in the contract, but from necessity, because there is no person in whose favor, or against whom, they can be enforced." Again, he says "A debtor and a creditor are essential to the very existence of a debt. There can be neither debt nor obligation without there be in actual being, or in expectancy, with the legal possibility of an actual existence, a person by whom the debt may be paid, or the duty performed, as well as a person who may receive the payment of the debt or accept the performance of the obligation. Wherever, therefore, the payor or the payee, the debtor or the creditor, or the person by whom the duty is to be performed, or who is to accept the thing which is to be done, ceases to exist without a representative, or the legal possibility of a representative, the debt or obligation ceases to exist, and the obligation of payment or performance is forever at an end." Nothing can be more correct than this, and nothing more in harmony with, and in support of the views which I have just presented.

It may be true, as was remarked by one of the Counsel for the plaintiffs in error, that we cannot always find the accurate reasons for a great Common Law principle, and that such a principle will sometimes survive the reasons in which it had its origin. But I think I have shown, that is to say, I think Sir *William Blackstone* and others to whom reference was made in the argument as authority, have shown—and I think Judge *Gaston* and Ch. J. *Smith*, whom I have just cited, (and whose opinions will not be disputed, unless the Counsel take issue with each other) have shown, that the principle in question is one which has not survived the reasons on which it is based.

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Indeed, it is, in my opinion, one of those plain principles, which carries the reasons on which it rests, in its own inherent nature.

The same counsel was of the opinion, that the case of *The Mayor &c., of Colchester vs. The Executor of Seaber* (3 Burr. 1866) was opposed to the idea, that upon its dissolution the debts of a corporation are extinguished, because there is no one to sue and be sued. Lord Kenyon said of this case in *Rex v. Clarke*, (2 East, 75) that it did not pass without doubt, and Mr. J. Lawrence observed, that it was questioned in *Rex v. Passmore*, (3 T. R. 199) but I am not sure that what was there decided should have been questioned, and am disposed to allow the full benefit of it to the plaintiffs in error. The Counsel is mistaken, however, in its purport. In that case, there had been a judgment of ouster against the Mayor and Aldermen of the Borough of Colchester in the year 1740, and the borough remained without officers, and without asserting its corporate rights until the year 1763, when another grant of chartered rights was made to it by the crown, and officers chosen under it. Before the old officers had been removed, a bond had been made payable to the Mayor and Commonalty by the defendant's testator, and action was brought upon it by the new magistrates. Out of this state of things arose the question, whether or not the old corporation had been dissolved by the ouster of its officers, and whether or not the corporation suing was a new and distinct corporation. If the former corporation were dissolved, its debts were extinguished—if only dormant, and it was revived by the new grant, its debts were not gone. Lord Mansfield, on this subject, held the following language: "I am clear, upon principles of law, that the old corporation was not absolutely dissolved and annihilated, though they had lost their magistrates; and by virtue of the new charter they are so revived as to be entitled to the credits and liable to the debts of the old corporation." And Mr. J. Wilmot says, "Wherever a corporation accepts a new charter, it remains, to every purpose, as it did before, though the name be altered," &c.

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It is thus made plain, that the case was put upon the ground that the corporation was never dissolved; there had always been an artificial person, in *esse*, to whom the debt was due. That person could not sue, it seems, for want of officers; but it maintained, according to the views of the Court, an artificial corporate being; its *rights* and *debts* remained the same; it retained the legal possibility of being represented by its officers. Analogous in its situation, in this respect, to the estate of a deceased person, upon which there has been no representation, and when it was represented by officers, it could assert its rights. And the effect of what the Court rules is, further, that if this corporation had been dissolved, it would then have parted, not only with an existence, but the legal possibility of ever being in a situation to enforce its rights, or to be held liable on account of its obligations. Instead, therefore, of being opposed to the view I have taken of the reasons on which rests the common Law rule under consideration, it directly supports

It was also insisted for the plaintiffs in error, that in the case of *The Pres. & Selectm. of Port Gibson vs. Moore*, (18 Ala. and Mar. 157) it was decided that though the members of the corporation had been individually liable for the debt of the corporation, yet they were released upon the dissolution of that corporation, because the debt was thereby extinguished. The case does not support this remark. Action was here brought on the debt, as one due from the Pres. & Selectm. of Port Gibson. I take it, therefore, that it was a debt due by the corporation; or at all events, only through the corporation. The P. & S. who contracted the debt, belonged to the old corporation which had been dissolved; and suit was brought against the new. The point made was, that the new charter was a revival of the old, and therefore the new corporation was liable. The Court "held that this last Act did not revive the old corporation, but was a new creation—a new Act of incorporation, and did not revive former liabilities of the old corporation extinguished," &c. No point was made in relation

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to the liability of individuals for the debt, and nothing in relation thereto was decided.

I could easily show, that none of the cases which have been cited controvert the views I have presented, and that some of them strongly support them; but a further examination of cases would occupy too much time and space. I therefore leave them with the observation, that not a single case which I have ever seen, directly or indirectly disturbs the conclusion, that there are reasons for the Common Law rule we have been considering, as such as have been presented; and not one in which this rule was recognized and applied, was a case in which, by the terms of the charter or otherwise, the natural person against whom suit was brought, had been made equally and severally liable with the corporation for the debt.

If then, such be the reasons for this rule, the reasons and the rule fail to apply to these cases, when it is shown that this charter contains a provision, by virtue of which and by reason of their having accepted office subject to it, these directors became liable individually and severally, together with the bank, for the payment of any excess of issues beyond what the charter authorized, which might happen during their administration; for then, notwithstanding the dissolution of the corporation, there did remain a person who was liable for the debt, and against whom action could be brought for it.

There being no difference of opinion between the members of the Court as to the other point made in these cases, the judgment of the Court thereon is delivered by my brother LUMKIN.

BENNING, J. dissenting.

Smiley brought an action of debt against Moultrie and others. In his declaration, he alleged that the defendants were the directors of the Commercial Bank of Macon, on the 29th of September, 1847; that the bank then owed, and up to the filing of that his suit, had continually owed, an amount of debts exceeding three times the amount of the stock of the bank paid in, over and above the amount of moneys actually deposited in its vaults for safe-keeping; that he was then a creditor of the bank for one hundred and seventy dollars, besides damages and interest, by being the holder of the promissory notes of the bank to that amount; that he had got judgments against the bank upon these notes, and had had *fi. fas.* issued on the judgments, and that the *fi. fas.* had been returned, with the entry on them, of no property to be found.

To this declaration, the defendants pleaded that the existence of the bank, by the act incorporating it, was limited to the first day of January, 1852, a day which (at the time of filing the plea) had passed.

To this plea the plaintiff demurred, and the Court sustained him in the demurrer.

To that decision the defendants excepted, and it is that which they have presented for review to this Court.

On review, a majority of this Court have affirmed that judgment. I did not think that that judgment ought to be affirmed, and therefore I dissented from the judgment of this Court. I am now to state my reasons for my dissent.

The declaration in this case is founded on a part of the eighth article of the charter of the Commercial Bank of Macon. The eighth rule is as follows: "The total amount of the debts which the said corporation shall, at any time owe, whether by bond, bill, note or other contract, shall not exceed three times the amount of their stock paid in, over and above the amount of moneys actually deposited in their vaults for safe-keeping—in case of excess, the directors under whose administration it

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shall happen, shall be liable for the same in their individual natural and private capacities, and an action of debt may, in such case, be brought against them or any of them, their heirs, executors or administrators, in any Court of Record in the United States having competent jurisdiction, either of them, by any creditor or creditors of the said corporation, and may be prosecuted to judgment and execution, notwithstanding any condition, covenant or agreement to the contrary notwithstanding. But this shall not be construed to exempt the said corporation or the lands, tenements, goods and chattels of the same from being also liable for and chargeable with the said excess; and such of the said directors who may have been absent when the said excess was contracted or created, or who may have dissented from the resolution or act whereby the same was so contracted or created, shall be liable as other directors for said excess. But such directors may be entitled to recover out of the directors assenting to such excess, by action of debt or otherwise, the amount which they may have been compelled to pay."

Answering the declaration to be true, the "promissory notes" of the bank, considered as consolidated, are evidence of the existence of only one single debt. But the debt is a debt, to the recovery of which are "liable" two parties—the bank and the directors. The bills are not evidence of the existence of "independent" debts; to the payment of one of which is liable the bank, and to the payment of the other the directors. It is manifest to me, both from the language and the spirit of the eighth rule. This, therefore, I shall assume.

The debt is one which exists, as I think I may say all debts are—by some contract, either expressed or implied. This debt is one, for the recovery of which, the bill actually in the said eighth rule is an action of debt that is an action which always has to be founded on a contract.

The debt is also one which is evidenced by "promissory notes," and these the charter makes to be contracts: eighth rule, when it says: "The total amount of the

which the said corporation shall, at any time owe, whether by bond, bill, note or other contract, shall not exceed," &c.; and as in the eleventh, when it says, "the bills obligatory and of credit, notes and other contracts whatsoever, on behalf of said corporation, shall be binding," &c.

Besides, if the charter is, itself a contract, every provision in it must be some part of the contract—must be matter of contract. And this Court, in the *Irvington Bridge Co. vs. Harrison*, (6 Ga. R.) decided a charter for the incorporation of a bridge company to be a contract.

This debt exists by contract. Who are the parties to the contract? on one side the bill-holder, on the other the parties liable to pay the bills—the bank and the directors.

Now, when on one side of a contract there is a plurality of parties, they must stand as joint contractors, or as joint and several contractors, or as several contractors. In reference, therefore, to the contract, under the eighth rule for the payment of these bills, the bank and the directors are to be considered as occupying the relation of joint contractors or of joint and several contractors, or of several contractors.

And of these parties, thus liable to pay the bills, the one I think is a principal, the others sureties. The directors, in my opinion, are but sureties for the bank—they have been so treated by the plaintiff himself. He first sued the bank; and had a return of no property, as against the bank, and he states these facts in his declaration, as a part of the cause of action which he has against the directors, and the plaintiff is, on one side, the party to the contract—that is to say, is the holder of the notes.

And that the bank occupies the place of a principal in the contract, also appears, I think, from this, that it was the bank and not the directors, it is to be presumed, that got the consideration which there was, for the issue of the notes. If the bank itself had paid these notes, could it, holding on to that consideration, go over upon the directors and make them repay it, what it had paid in taking up the notes? Whereas, if the directors had paid the notes, what is there to prevent them from having had re-imburement from the bank?

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Does not the same thing appear too from this? The ~~charter~~ by the fifteenth rule, provides that the stockholders shall be bound, in person and property, for the ultimate redemption of the bills issued by the bank, meaning does it not, such bills as shall be issued *not* in "excess"—the eighth rule having said, that for the redemption of those issued in excess, the directors, as well as the bank, should be liable. Now, under a similar provision to this fifteenth rule, contained in another bank charter, this Court has said that the relation which the *stockholders* sustained towards the bank, was that of sureties. (11 Ga. R. 517. 8 Ga. R. 478.) And whatever reasons exist for saying that as to the bills issued *not in excess*, the stockholders shall be sureties and the bank principal, the same reasons exist for saying that as to the bills *issued in excess*, the directors shall be sureties and the bank principal. So to me it seems.

I think I may say, then, of these parties, thus liable by contract to pay these bills, the one party stands as principal, and that is the bank; the other as surety, and that is the directors.

If this be so then, as by the law of principal and surety, whatever even *discharges* the principal, although it does not *extinguish the debt*, discharges the surety—the dissolution of this corporation was the discharge of the directors from this liability; for the dissolution of a corporation is, without dispute, the *discharge* of the corporation itself from its debts.

But say it is not true that the directors are only sureties for the bank, then the debt being but a single debt, they must be liable to pay it either as joint contractors with the bank, or as joint and several contractors with the bank, or as several contractors. Let them be considered as liable in one of these ways.

Now it is a general principle of law, that when what is but a single debt exists against several persons, whether as joint contractors or as joint and several contractors, or as several contractors, whatever extinguishes the debt as to one of the contractors, extinguishes it as to all.

This principle follows from the nature of extinguishment. What is the nature of extinguishment? "EXTINCT commeth of

the verb *extinguire*, to destroy or put out; and a rent is said to be extinguished when it is destroyed and put out". (1 *Coke Litt.* 147 b.) "EXTINGUISHMENT *in contracts*, the destruction of a right or contract, the act by which a contract is made void." (*Bouv. Law. Dic.*) "WHENEVER a right, title or interest is destroyed or taken away by the act of God, operation of law, or act of the party, this, in many books, is called an extinguishment". (3 *Bac. Abr.* '*Extinguishment*'). These definitions, indeed, give but the common import of the word extinguishment.

Now when a debt is "destroyed," "put out," *extinguished*, as to one of the parties to it, the debt is, of necessity, as to all, destroyed—put out—extinguished. To destroy, to put out, to extinguish a thing at all, or as to any other thing, or for any other purpose, is to destroy, to put out, to extinguish the thing wholly, as to all other things—for all purposes. To say differently is to say that a thing may at one and the same time be dead, and yet alive. Can a thing be more than extinguished?

A common instance of extinguishment happens when one of the parties to a contract for the payment of money pays the money. Let say a bill of exchange be paid by *any* of the parties to it—by the drawer—by any endorser—by the acceptor—the debt due *to the holder* is totally extinguished. He, if paid by the acceptor, (say) cannot also get payment from the drawer. His debt, by *one* payment of it, is wholly extinguished. That is to say, when his debt is extinguished, as to one of the parties liable to him, by a payment made by that party, the debt is, as to all the parties liable to him, equally extinguished.

So, let it be supposed, that in this case this debt had been once paid the bill-holder, by either the bank or the directors, can there be a doubt that the debt would not have been extinguished, as to both the bank and the directors?

But payment is but one of the means which exist for extinguishing a debt. And there can be no difference, as to consequences between an extinguishment of a debt, produced by one means, and the extinguishment of it produced by any other. If, therefore, a debt is, by any means, as to one of the parties

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liable to pay it, extinguished, it is extinguished as to all the parties liable to pay it. Payment can do no more than extinguish a debt—whatever extinguishes a debt does as much as payment can do.

The general rule then is, that whatever extinguishes what is but a single debt, as to one of the parties liable to pay the debt extinguishes the debt as to all the parties liable to pay it.

Now one of the effects of the dissolution of a corporation is, that all of the debts due to and from the corporation are extinguished.

That this is one of the effects has, after the most elaborate argument, been held by this Court. In *Thornton vs. Lane* (11 Ga. R. 491,) the language of this Court is—"why so much time and talent, labor and learning have been employed to establish a proposition which no body denies, viz: that the debts of a corporation, either to or from it, are extinguished by its dissolution, I am at a loss to comprehend. Certain it is, that it was recognized by this Court, at this place, two years ago, as it had been on more than one occasion previously". Indeed, in this case, this proposition was admitted, both by the Counsel for the defendant and by the majority of the Court.

It follows, that when this bank was dissolved by the expiration of the term of its charter, this debt, which it owed to this bill-holder, was extinguished; and the debt having been extinguished, as against the bank, it follows, from the nature of extinguishment, that it was also extinguished as against the directors.

This, plainly, is the necessary conclusion from the foregoing propositions. It is therefore true, if the propositions are true. I have endeavored to show that they are true.

It was argued, however, for the defendant in error, that one of these propositions is not true in the absolute form in which it has been stated, viz: the proposition that on the dissolution of a corporation, the debts to it and from it are extinguished. It was contended that this proposition, to be true, should have had annexed to it a *condition*—such a condition as would have made it assume this form: on the dissolution of a corporation,

the debts are extinguished, provided there is not some one in existence to sue for the debts the corporation owns, and to be sued for those it owes; but if there is any such person in existence, then they are not extinguished. The addition of this condition was made necessary, it was urged, by the character of what was alleged to be the reason of the rule of extinguishment—that reason being alleged to be the non-existence, on the dissolution of a corporation, of any person to sue for the debts due to the corporation, or to be sued for those due from it.

The truth of this, one of these propositions, has perhaps another objection to struggle with—one which, however, was not urged in this case, although in the case of *Thornton vs. Lane*, (11 Ga. R. 496,) it was relied upon and stated in these words: “And why should it be thought a strange thing for the corporation, itself, which is *primarily* liable to be exonerated under the operation of the Common Law rule to which we have adverted, and for the *personal* liability of the stockholder, which is *secondary* only, to be retained and enforced? It would not be pretended that a debt due by the bank, and upon which there was an *indorser*, could not be enforced against the latter, notwithstanding the discharge of the principal. Nor is this any new principle, either in legislation or jurisprudence. It has occurred a thousand times and oftener, no doubt, under the bankrupt acts of England and of this country, that the principal debtor has been released by law, while the debt has been enforced against other parties to the paper, who were in no way interested in its consideration, which cannot be said, by the by, of these corporations”.

This objection, if allowed to prevail, would produce a radical change in the proposition or rule—it would expunge from the rule the word *extinguish*, and substitute words expressive of a different idea—it would make the rule take this form: on the dissolution of a corporation, the corporation is “*exonerated*” from the debts due from it, but the debts themselves are *not extinguished*. They remain in existence, and may be enforced against any other persons who happen also to be par-

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tice to them. As to the debts due to the bank, the rule, if made to take this form, is silent.

Ought the statement of the rule to be modified, in one or both of these ways? This is the question which I will now try to answer.

I think the rule is not to be modified in either of these ways. And my reasons for this opinion are—First. That in all of the many places in which I have seen the rule stated, there is not one in which it is stated with either of these modifications; and the modifications are so very important as to make me feel sure that if they existed, they would, in some place, at some time, by some body, have been mentioned in connection with the rest of the rule. Secondly. I have read a good number of decisions, made by different Courts, which, if this rule be subject to these modifications, must have been the reverse of what they are. Thirdly. What I regard as the reason of the rule, will not permit the rule to take these modifications.

As to my first reason, I find the rule stated in *Blackstone*, in these words: "The debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover or be charged with them, in their natural capacities". (2 *Black. Com.* 484.) In *Kent*, in these: "The debts due to and from the corporation, are all extinguished. Neither the stockholders nor the directors or trustees of the corporation, can recover these debts or be charged with them, in their natural capacity". (2 *Kent's Com.* 353.) In *Angell & Ames*, in the same words as in *Blackstone*. (*Ang. & A.* §779.) In *Grant*, the latest English work on corporations which I have seen, the rule is stated in these words: "The corporation (by dissolution) is wholly gone; and with it are lost and avoided all its claims, debts and liabilities, of all kinds. Both the property choses in action and other rights of the corporation, as well as its liabilities, *ipso facto*, pass from it on the event of dissolution". (*Grant on Corp.* 303.)

Now, to give the rule exactly as it is, was part of the spe-

the business of these writers. It is to be inferred, therefore, that if the rule is subject to the aforesaid modifications, these writers did not know of it.

In every decision of any Court which I have seen, in which the rule is stated or acted on, except that of *Thornton vs. Meade*, (11 Ga. R.) it is stated or acted on, in a sense the same as that expressed by the writers aforesaid. Of these decisions, however, I will refer only to such as also support my second reason, which is, that there are decisions in good number, which, if this rule be subject to these modifications, would have had to be the reverse of what they are. These I will mention. The first is a decision made in Delaware, and made on these facts: An incorporated bank got a judgment against a debtor on it. Afterwards the bank was dissolved by the limitation of its charter. A year or two after the dissolution, the Legislature passed an act "reviving, renewing, continuing and extending the corporation from the first day of March, which was in the year 1830, until the first day of March, 1885," and "reviving, renewing, granting, continuing and extending the powers, privileges, rights and immunities theretofore granted the said corporation." After the passage of this act, the bank took out its *facias* on the judgment, to revive it. The defendant, among other things, pleaded that by the dissolution of the corporation, the judgment was extinguished. This plea was held by the Court to be a good bar. *Commercial Bank vs. Locked* (2 Harrington, 14.) The language of the Court is this: When, therefore, the Commercial Bank, by the positive provision of its continued charter, had, after the first day of March, 1830, ceased to exist and was then dissolved without either a representative or the possibility of one, as no provision made by our laws for a representative in such a case, the debts due to it became, at the instant of dissolution, in the emphatic language of the law, *extinguished*—not the right to or remedy for the debt suspended merely, but the debt itself annihilated." The word of the Court is "*annihilated*," not "*exonerated*". And the act of the Court is according to the word. Now here is a case in which, notwithstanding the dissolution, there was

some body to bring suit—the revived corporation. Yet the decision was, that the revived corporation could not bring the suit—whereas, the decision should have been just the reverse of that, had the rule been that dissolution extinguishes a corporation's debts only, when there is no body to sue or be sued.

The next decision to which I refer, is one made in Tennessee, in *White vs. Campbell et al.* (5 *Humph.* 38.) It was made on these facts: After the expiration of the charter of an incorporated bank, that of the Bank of the State of Tennessee, one of the bank's debtors, gave the president, directors and company of the bank a note for the debt; and to secure the note, executed a deed of trust—on this note, judgment was rendered at law, and on the judgment, a *fi. fa.* was issued, which was levied on the property contained in the deed of trust. Afterwards, the person to whom the deed of trust was made, filed a bill to have that deed set aside as illegal.

The Court say "that The Bank of the State of Tennessee was not in existence at the time the note and deed of trust were executed, is not and cannot be controverted. The necessary consequence is, that both the note and the deed of trust are inoperative and void, the one for the want of a payee, the other for the want of a *cestui que trust.*" And they cite what I have quoted from *Kent.* The Court add, "But it is argued that it appears from the answer of the defendant, that the debt was fairly due from the defendant, Campbell, and that the intention in executing the note and deed of trust, was to secure the stockholders in that amount, and not the institution. This argument is a fallacy. We cannot recognize the existence of stockholders of a defunct corporation," &c.

Now here was some body to sue and be sued, viz: the parties actually contracting with each other; and here was the intention on the part of those parties, that one might sue the other; for it appeared "that the debt was fairly due from Campbell, and that the intention in executing the note was to secure the *stockholders*, and not the institution". Yet, the Court held that one party could not sue the other. So com-

pletely was the old debt extinguished, that it could not serve as the foundation or consideration for a *new promise*, secured by an instrument under *seal*. This seems to have been the view of the Court.

The next decision to which I refer, is one made in Alabama, in *Paschall vs. Whitsett*, (11 *Ala. N. Series*, 472.) It was made on these facts: "The plaintiff in error having recovered a judgment against the Gainsville & Nankeetah Railroad Company, a corporation, caused the defendant to be summoned as a garnishee". He answered, among other things, "that the company, previous to the issuing of the garnishment, ceased to have any legal existence". This answer the Court held to be a sufficient one. The language of the Court is, "But for whatever cause it may become defunct, we have seen that the debts due to and from it, are totally *extinguished*; and in no just sense can one be said to be its debtor, either as a stockholder or otherwise". Yet, in the case, there were parties and a proceeding between them, the garnisher and garnishee—the garnishment. The garnishment was founded upon a *judgment* obtained against the corporation, before its dissolution; and in ordinary cases, a judgment may be enforced against property, even if there is *no* existing party defendant to the judgment, if, since judgment, the defendant has died. But not in the case of a judgment against a dead corporation. In that case, the debt, say the Court in italics, is *extinguished*. That is the word, not "exonerated"—not that the defendant is personally exonerated, and the debt left open against his property and his sureties. They do not say this.

I next refer to a decision from Mississippi—that made in the *President, &c. of Port Gibson vs. Moore*, (18 *Smedes & Marshall's R.* 158) on these facts. Moore had an account against the President, &c. of Port Gibson. After the account had become due, the charter of the President, &c. was repealed. Shortly after its repeal, it was revived. After the charter had been revived, Moore sued the revived corporation for his account.

The Court say, "The Act of repeal, when accepted by the

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corporation, was a dissolution. It is now the settled doctrine upon Common Law principles, independent of any Statute declaring a different rule, that upon the dissolution of a corporation, the debts due to and from it are extinguished. *This is conceded in argument*". And they hold the account to be extinguished. Yet, here is somebody to sue and be sued. If the rule is such as not to extinguish debts, but only to suspend them until somebody can be found to be sued, here was the place for it to have come in and made the Court give a judgment just the opposite of that which it gave. Here the old debtor, himself, was again made alive. And if the rule would not let him be sued, would it have let his surety be, supposing he had had one? This Court, I think, would have said not. It would have said "extinguishment" must have its effect.

I come, now, to the decision in *Fox vs. Horah*, made in N. Carolina, (1 *Iredell's Eq. R.* 358) on these facts: A loan was obtained by Hoskins, with Fox and Long as sureties, from the State Bank of N. Carolina. The note was made payable to Horah, cashier. Upon this note, Horah sued the parties to it and got a judgment against them. Pending the action the charter of the bank expired, and an attempt was then made to set up this occurrence as a legal defence: but it failed, because the Court held that "the legal interest in the debt was in Horah, and the action properly brought by him, and whether he was a trustee for the bank, or any other person, was an inquiry with which a Court of Law had no concern." Then Fox filed a bill against Horah, in which he insisted that by the expiration of the bank's charter, the debt had become extinguished in equity, notwithstanding that at law, in consequence of the legal title to the debt being in Horah, the debt might not be extinguished. And the Court sustained his bill. The opinion was delivered by *Gaston, J.* and it seems to have been well considered. It is certainly very clearly expressed. The opinion has in it these words: "When the creditor corporation died, and there was no successor--no representative--the relation of debtor and creditor ceased, and the debt became necessarily *extinct*." "Upon the death of the bank,

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without succession or representative, this debt became, *by law*, as completely extinguished as it would have been by a release from the corporation."

Now in this case, there was some body to sue—some body to be sued—there was, in fact, a suit at law, and what is more, a judgment of recovery in that suit—and a judgment resting upon a title good *at law* against the world.

If, then, in such a case, the Court held the debt to be extinguished even in equity, it is certain that the Court could not have considered the true rule to be that on dissolution, the debts are not extinguished if there remains any one to sue or be sued. But let it speak for itself: "It is urged that although the defendant has no equitable title to this money, neither has the plaintiff, and therefore the Court ought not to interfere, but suffer the law to prevail. Now, without repeating what has before been stated, that the extinguishment of the creditor's equitable right annihilates the equitable debt, so that the plaintiff *no longer owes*, and therefore in equity, has a perfect right to this money, it is enough that he does not owe it to the defendant, to give him an equity against the defendant. The money is yet in the plaintiff's hands, and he has a right to keep it against all the world, unless it be required from him by one to whom it is due, or in behalf of one to whom it is due. *Melior conditio possidentis*."

In short, the Court rides rough shod over the idea, that because there may be some body to sue and be sued, the debt is not extinguished.

Now these decisions are all certainly in point, to show that on the dissolution of a corporation, the extinguishment or non-extinguishment of the debts, does not depend on whether there is any body to sue or be sued. They are in point, to show that notwithstanding there may be somebody to sue and be sued, yet the debts are extinguished.

But these decisions being the decisions of Courts which have never been made the exponents of what the Law of Georgia is, are, it is true, not to be considered authoritative to her Courts. Still, perhaps, they may be regarded as some evidence of what

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is the Common Law upon the question, and that is the part of the Law of Georgia which governs the question.

They are, some or all of them, in point too, to show that extinguishment of the debts does not mean suspension of the debts—"exoneration" from the debts.

I will now turn to a couple of cases that are more authoritative—a couple of old English cases :

"A parsonage appropriated to a prior alien, was charged with an annuity, and after, was seized into the King's hands, and it was enacted by Parliament in time of H. V, that the possessions of prior aliens SHOULD remain in the King and his heirs forever ; and the King granted the parsonage to another and his successors, as it was in the King's hands ; and the charges brought a writ of annuity against the grantee of the parsonage, &c. And the best opinion was, that the annuity is determined, for the corporation is dissolved. (Viner's Abr. Rent, B. b. 4.)

Now if by the dissolution of this corporation, the annuity which it owed, was merely suspended for want of some one to be sued for it, that want was supplied by the revival of the corporation in a new parson ; and the decision should have been that the new parson was liable to pay it. The decision, however, was, that by the dissolution of the corporation, the annuity was "determined."

*"Money was borrowed by the Company of Woodmongers, who were incorporated, and a bond was sealed with their common seal, and subscribed by the defendants, who were two of the principal of the company. The bond was *noverint universi &c. Nos registrum and guardianos, &c.* of the company of Woodmongers, *teneri, &c.* ; and now, the company being dissolved, action was brought against those who subscribed the bond, but ruled that it could not lie, so the plaintiff was non-suit." (Viner's Abr. Corporations p. 5.)*

It seems that in this case, two members of the corporation subscribed the bond ; and that the corporation sealed the bond.

The defendants did not plead *non est factum*. So I infer that they signed the bond as sureties. Indeed, I see no reason

why they should have signed it at all, except it is that they might become bound; still, I may be mistaken in this. If so, the report of the case which is in *Lev. 287*—it being *Edmonds vs. Brown*, will probably correct me. That report is not within my reach.

Assuming that I am right—assuming that these defendants, by subscribing the bond, intended to bind themselves, then the case is directly in point, to show that the extinguishment of the debts which follows the dissolution of a corporation, is one which follows, whether there is any body left to sue or be sued for the debts or not; and also to show, that this extinguishment means the extinguishment of the debt—not a suspension of the debt—not an exoneration from the debt.

In relation to this last point, viz: whether the extinguishment of the debts consequent on a dissolution of a corporation, is not to be considered merely as a *discharge or exoneration* of the debtors from the debts, in the same way as the discharge of a bankrupt is a discharge or exoneration of him from his debts, I have a few more words to say.

It was not insisted in the argument of this case, that the extinguishment of corporation debts, on a dissolution of the corporation, is of the same nature as that of the discharge of a bankrupt on his bankruptcy, from his debts. It was, however, said to be of the same nature, by this Court, in the case of *Thornton vs. Lane*; as may be seen in the passage from that case which I have quoted. Hence, I think it my duty thus further, to notice the point.

In the first place, then, the language of the law which defines the consequences of bankruptcy to the debts of the bankrupt, is different from that which defines the consequences of dissolution to the debts of the corporation. The language for the former is, that the bankrupt shall be *discharged* from all debts due by him at the time he became a bankrupt—not that the debts shall be *extinguished*. On the contrary, there is another part of the same law which says that the debts are to get their dividends of the bankrupt's estate, which they could not do if

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they were things that had been extinguished. The language of the law, with respect to the consequences of dissolution, uniformly is, that the debts are *extinguished*.

But in the second place, the Bankrupt Acts, themselves, provide for keeping the bankrupt's debts, after his bankruptcy, alive against other persons liable for the same debts. "By the Statute 10 Ann. 15, the discharge of a bankrupt from his debt, shall not be construed to release any other person who was partner in trade, or jointly bound, or liable to the same debt with the bankrupt". (*Com. Dig. Bankrupt D. 34.*) This provision was carried into the new general Bankrupt Act of 6 Ga. 4, 16. (*Eden Bank. Law, 396.*)

In the Bankrupt Act of the United States, passed in 1841, a similar provision was inserted. It is in these words: "*Provided*, that no discharge of any bankrupt, under this Act, shall release or discharge any person who may be liable for the same debt as a partner, joint contractor, indorser, surety or otherwise, for or with the bankrupt". (*Sec. 4.*)

What is it, then, but these statutory provisions that prevents the mere *discharge* from his debt, of even a *bankrupt*, from operating as a discharge of all those bound with him or for him, to the payment of the same debt? But there are no such provisions of law to control the much stronger thing, *extinguishment* of the debt, consequent on the dissolution of a corporation. Must not that thing then have its full operation? I think it must.

My third reason for thinking that the true rule, as to extinguishment, does not take this form, viz: that the debts are extinguished only in case there is no one to sue or be sued for them is, that the only argument which I ever heard used in favor of the rule's taking that form, seems to me not to be well founded. That argument is, that on dissolution, the debts are extinguished, *because* then there is no one to sue or be sued for them. This, according to the argument, is the *reason* of the rule. What I have already said, shows, I think, this *not* to be the reason. In addition, I wish to hazard a word as to what is the reason.

This rule, as to extinguishment of the debts on dissolution, is not a part of the general rule which defines the whole consequences of dissolution. That general rule is stated by *Angell & Ames*, correctly no doubt, in these words: "At Common law, upon the civil death of a corporation, all its real estate remaining unsold, reverts to the grantor and his heirs; for the reversion, in such an event, is a condition annexed by the law, inasmuch as the cause of the grant has failed. The personal estate in England vests in the King, and in our country in the people or State as succeeding to this right and prerogative of the Crown. The debts due to and from it, are totally extinguished; so that neither the members nor directors of the corporation can be charged with them in their natural capacities."

Now, it seems to me that the reason of the latter part of this rule is to be found in the existence of the two former parts. After these two parts of the rule had stripped the corporation of its whole property—had deprived it of its entire means of paying its debts, the best thing remaining to be done with the debts was to extinguish them; so that, as to him who owned them, they might not serve as a source of vain hope; and as to those whom he might suppose to owe them, the disjointed members of the dissolved corporation, they might not be turned into an instrument of useless harassment and expense. And to extinguish them was best, even though there might be others bound as sureties for their payment. For in such case, the sureties, if made to pay them, would, themselves, become, by such payment, the holders of the same debts, and as much entitled to have the debts paid by the corporation, as the original creditors had been. And the original creditors and the sureties, thus become creditors, would be parties equally innocent—equally meritorious. There is no reason, therefore, why the sureties, rather than the original creditors, should be made the sufferers. There are some reasons why they should not be. More of evil would come of making them the sufferers than would of making the original creditors the sufferers. To make them the sufferers quiet things would have to be disturbed; there would have to be arrangements for getting the money to

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pay the debts, &c.; the conveyance of the money, when got, to the creditors; the adjustment of the sums due; the writing of acquittances, &c.—trifles it is true, yet implying some degree of evil; the loss of some little time and labor; the incurring of some little expense; the undergoing of some degree of trouble and vexation. All this evil, such as it is, would be saved by making the original creditors, instead of the sureties, be the sufferers. In all other respects, the two classes would stand equal. The maxim, that of two innocent parties, one of whom must suffer *melior est conditio possidentis*, is not only law but wisdom.

This, as to the debts due from a corporation. As to those due to it this: By one of the two first parts of the general rule, the goods, that is the *choses in possession*, pass to the King. The debts due to the bank, if collected, would become *choses in possession*; and so, by that part of the rule, they would merely follow the course of the other goods and pass to the King. Why did not the rule, instead of extinguishing debts of this sort, require them to be collected and paid over to the King? Perhaps, for the reason that at the early time when the rule was a making, such debts were trifles not worth the King's pursuit, or perhaps as the question whom such debts should go to was a question of pure bounty, it was thought by the makers of the rule that the "poor debtor" is a more deserving object of bounty than the great King.

I hazard, then, the opinion, that the true reason why the law extinguished the debts due by a corporation on its dissolution was, that it had itself first extinguished all the means by which the debts could be paid: by giving back the corporation's real property to the person from whom it had come, and by transferring its personal property to the King.

Indeed, could the law-maker, when making this rule as to extinguishment have said, it is necessary to extinguish the debts because there is no one to be sued for them? For the law-maker must have known, that by the law as it stood, when he was making the rule, a debt is not necessarily extinguished, because there is no one to sue or be sued for it. When a man

there is no one, at first, to sue or be sued, as to *his* debts, ~~he~~ debts are not extinguished. So, when a trustee dies removed from his trust; so when a debtor is without the diction. Was it ever thought that inability to bring suit ~~ese~~ cases, was a reason which made it necessary to say the ~~s~~ should be extinguished?

less, therefore, the law-maker had had for making this of extinguishment some other reason than that which exists in these cases, viz: a mere want of some body to sue or ~~ed~~, would he have made the rule the rigid one of extinguishment, which it is? Would he not rather have made it one ~~er~~ to that which exists in the case of the dissolution of a ~~real~~ person, which is that the collection of the debts due to from such person, shall be *suspended* until a *successor* can be appointed to take the place of the deceased person, but not ~~er~~? How easy for the law-maker to have said this, if his ~~s~~ want was some body to sue and be sued. But this he ~~not~~ say. What he said was, that on the dissolution of an ~~erial~~ person, its debts should be extinguished—its property ~~ld~~ not be administered for the benefit of creditors, but ~~ld~~ go by the mere operation of law to others—the land to from whom it had come—the goods to the King.

much as to what is and what is not the reason of the rule. The result of the whole inquiry, in my opinion is, to make the true meaning of the rule, that on the dissolution of a corporation its debts are extinguished this, that on such dissolution the debts are *annihilated*—annihilated *absolutely*, not conditionally—not on condition that there is no one to sue or ~~ed~~ for them.

this be the true meaning of the rule, it follows that on dissolution of this corporation, this debt was totally *annihilated*—annihilated; both as to the corporation and as to the ~~tors~~.

and the practical result would be, that the plea of the ~~dis~~ ought to be considered a good bar.

thus far I have treated the case as having but one aspect—which presents the bank notes as constituting, each, only

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one single debt ; but that a debt due by *contract*, not by *tort*, and due by two separate parties—the bank and the directors—and the result at which I have arrived, has been, as above stated, the extinguishment of the notes, both as to the bank and directors. And this, it seems to me, is the only aspect which the case has.

Let us suppose, however, that it has another—an aspect of *tort*. Let us suppose, that though there is only a single debt due, but due from both the bank and the directors ; yet, it is a debt founded on a *tort*. Let us suppose, if we can, that although the charter is a general contract, and the notes to be paid are each particular contracts, and the liability of the directors is a liability growing exclusively out of the charter, and a liability to pay these notes ; yet, notwithstanding all this liability, on the part of the directors, is a liability sounding in *tort*, and not in contract, whilst the liability, on the part of the bank itself—a liability growing out of the same charter—a liability to pay the same notes, is one sounding in contract and not in *tort*. If this be supposable, let us suppose it. Then the question will be, the bank and the directors being each liable for this one single *tort*, i. e. one *tort* for each bank note, does the extinguishment of that liability, as to the bank, extinguish it as to the directors ? And I say it does.

“Also, if two men do a trespass to another, who releases to one of them, by his deed, all actions, personalls ; and notwithstanding, sueth an action of trespass against the other, the defendant may well show that the trespass was done by him and by another, his fellow, and that the plaintiff, by his deed, (which he sheweth forth) released to his fellow all actions, personalls, and demand the judgment,” &c. This is the text of *Littleton*, and the commentary of *Coke* corresponds with the text. (*Coke. Litt.* 282, a.)

If a release of the right of action for a *tort*, given to one of two *tortfeasors*, releases the other, much more would an extinguishment of the debt or damages due for a *tort*, as to one of two *tortfeasors*, extinguish the debt or damages as to the other. Can there be a doubt of this ?

Whether the debt of the directors, then, be one by *tort* or by contract, the effect is the same. The extinguishment of the debt, as to the bank, is the extinguishment of the debt, as to the directors.

Hitherto, I have gone on the supposition, that the bill-holder, in this case, had but one debt due to him on each of his bills, though it was due to him by each of two parties—the bank and the directors—and consequently, that he was entitled to but one payment. Say, however, that this supposition, so self-evidently true, as to me it appears to be, is yet untrue. Say that the bill-holder had the right to have payment of each of his bills twice—once from the bank and once from the directors. Say that the liability of the directors is distinct from and *independent* of the liability of the bank, so as to be totally unaffected by anything which affects the liability of the bank, then the question is, whether the liability of the directors, it being such as this, survives the expiration of the bank charter.

That being the question, *my* answer is, that the liability of the directors does *not* survive the expiration of the charter. And it is in the answer to this question, perhaps, that I differ most from the opinion of the majority of the Court; for they, if I understood them aright, put their judgment upon the idea, that by the charter, the liability of the directors was an “*independent liability*”; was one which would exist, even though the liability of the bank, itself, should cease to exist. They considered, that with respect to the liability of the *bank*, the liability had ceased, having become extinguished by the dissolution of the bank. Indeed, that this was so, was not considered an open question, it having been decided by the Court, after most thorough argument, in the case aforesaid, in 11 *Ga. B.* And that it was so, was not disputed by the Counsel for the bill-holder. The debt, then, as to the bank, having to be considered as extinguished, and yet, the majority of the Court still considering the directors liable to pay the amount of the debt, it was absolutely necessary, as it seems to me, for the Court, in order to have a foundation for this judgment to rest on, to hold the debt against the directors to be an *independent*

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pendent debt; that is to say, to hold, that before the dissolution of the bank, each of these bank notes was evidence of two distinct, independent debts—one against the bank, the other against the directors. If the notes were evidence, each, of but one debt, though that might be a debt against two parties, how could that debt, when extinguished—destroyed—annihilated, exist at all—exist against either of the parties; therefore, how could it exist against the directors? How could it exist against the directors, even should we assume the most unassumable of things, viz: that the directors were principals, and the bank but a surety? For if even a surety pays a debt—if as to surety even a debt becomes *extinguished*, it is equally extinguished as to the principal. The holder cannot, then, call on the principal for payment, although; if the extinguishment be by *payment* of the debt, on the part of the surety, the surety may call on him for the payment of the new debt thus arising. Of course, if, as to the principal, the debt, by any means, becomes extinguished, much more is it true that the debt becomes extinguished, as to the surety. This all, however, I have already endeavored to show, and think I have shown.

If I have, then it follows, that when the majority of the Court hold the debt—hold a debt still to exist against the directors, they must hold that there had, before the dissolution of the bank, been existing for each bank note two debts, one against the bank, the other against the directors; and that of these two debts, it was only one which, by the dissolution of the bank, was extinguished, viz: that against the bank. This, to my mind, follows, of necessity.

For argument's sake, let it be admitted, therefore, that the bank notes constitute, each, evidence of two debts—one debt against the bank and another, and an "independent" debt against the directors, then did that one of the debts which was against the directors, expire with the expiration of the charter?

That one of the debts, if it existed at all, existed by virtue of the charter. This is clear.

If it existed at all, it existed too, as a *penalty*. The directors

got no benefit from issuing the bills. The consideration for the issuing of the bills went to the bank. But such bills—that is those thus issued in excess, being forbidden to be issued, and it having been put in the power of the directors to prevent their being issued, this liability to pay them, if issued, was imposed on the directors, as a *penalty* for not preventing the doing of that, the doing of which it was made their duty to prevent. That this debt was a *penalty*, therefore, it seems to me is equally clear.

The question, to my mind therefore is, will a penalty survive that which imposes it? Now although this penalty (as I call it, on the assumption I am now going on, of its being an independent debt,) clearly results from the charter and from nothing else; yet, it was considered by the majority of the Court, if I understood them aright, as resulting from a *law*, the charter being, in this respect, to be considered, in the opinion of the majority, not as a contract, but as a law.

Let the charter then be considered as a law. Then I think the question, whether a penalty will survive the law which imposes it, has been settled by this Court.

In the *Bank of St. Marys vs. The State*, (12 Ga. R. 496,) this Court say, “we fully and unanimously concur, then, in the following conclusions: that the authorities cited, abundantly sustain the position that an informer who *commences* suit under a Penal Statute, does not acquire thereby a *vested right*—that his claim to the penalty, at most, is *inchoate* only, and cannot be fixed or vested, except by judgment—that no judgment can be rendered on a repealed Statute—that the repeal of the Statute prevents the imperfect right from being consummated or from becoming a vested right or contract; and that it is perfectly within the legislative competency to pass such repealing Statutes before *final judgment*”.

These “conclusions” more than cover this case. They are broad enough to cover it, had it, instead of being what it is, been such that the Legislature had *repealed* this eighth rule in the charter, *long before* the time of its expiration, provided the

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appeal had been made, also, before these bill-holders had got actual judgment against the directors. And these "conclusions" rest upon a most solid foundation, as any one may see who will be at the trouble to read the able opinion, of which they are the result.

They are recognised and affirmed in *Lyon vs. the State*, in 154 Ga. R. a case of the repeal of a law giving a right to the Solicitor General, &c. to have his costs out of penal bonds, &c. as far as one particular bond was concerned.

They have been recognized, in other cases, by this Court.

Is there any difference between the effect of the expiration of a law, and that of the repeal of the law? It was so argued, and two cases were cited to prove the argument. (8 Mees. & Wels. 234. 8 Adolph. & Ell. 690.) These cases, however, prove nothing of the sort. It is true, in these cases, the law in question had expired; and yet, the decisions were, that the rights given by the law, had not expired with the law. But the decisions were not put upon the ground, that there was a difference in the effects, between the expiration and the repeal of a law: but on the ground, that before the expiration of the law, the right given by the law had become a completely vested one. But according to the *Bank of St. Marys vs. The State*, a right to a penalty, never does become a completely vested one, before a judgment has been rendered for the penalty.

In the nature of the thing, it is impossible for any difference to exist between the effects of expiration and those of repeal.

By expiration, a law ceases to be; can repeal do more than make a law cease to be?

Thus, then, I have gone through with all the arguments which were presented to the Court, or which I can think of, to show that notwithstanding the expiration of this charter, the liability of the directors still remained; and the conclusion to which I have come is, that those arguments do not show it. On the contrary, on a careful survey of the whole ground, it seems to me most clear, that with the expiration of the charter, expired all liability, on the part of the directors.

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Indeed, I may say, that to my mind, nothing is left for argument when it is once admitted, that on the dissolution of a corporation, the debts which it owes are extinguished. For to say that the debt which is produced by the issuing of a bank bill, "in excess" is not a *single* debt, to the payment of which two parties are liable—the bank and the directors—but is a *double* debt, to the payment of one half of which, as an independent debt, one of those parties is liable and the other of them, to the payment of the other half, is a proposition which, I think, will not bear stating. It becomes necessary, therefore, to admit that the debt is a single debt; but a debt, to the payment of which two parties are liable. And to say, that when a debt, to the payment of which two parties are liable, is extinguished as to one party, it is yet not extinguished as to the other, is to say what would, I think, make a revolution in the law of contracts. Would it not produce a revolution in that law, to say that payment by one of the parties liable to pay a debt, should not count for the other parties? And yet, what is payment but one out of many modes of extinguishing a debt? The very utmost that payment can do, is to extinguish the paid debt. And whatever else extinguishes the debt, does as much as payment can do. And this *extinguishment of the debt*, is the thing from which the consequences flow—the thing which, even in the case of payment, sets free the parties.

My conclusion, therefore, upon the whole is, that with the expiration of the charter, expired the liability of the directors to pay these bank bills. And for this conclusion, I have stated my reasons.

In the other case, that of *Moultrie vs. Neal*, which is like this, in all respects, I also dissent, and for the same reasons.

Poe, adm'r., vs. Schley.

No. 33.—WILLIAM C. POE, administrator &c., plaintiff in error,
vs. GEORGE SCHLEY, defendant.

[1.] By will, C appointed S to act as guardian of the property of his children; at the same time, appointing others to act as guardians of their persons. After C's death, his children inherited property from an uncle. S, as guardian, under the will, sued the uncle's administrator for this property, without making it appear that he had given bond and security, for the proper management of the property: *Held*, that S had no right to recover the property from the administrator.

In Equity, in Bibb Superior Court. Decided by Judge POWERS, January Term, 1854.

The facts in this case are as follows :

On the 16th of April, 1851, Charles Cunningham executed his last will and testament, by which he constituted and appointed Mrs. Eliza F. Poe, and Mrs. Ellen Fitzsimmons, the personal guardians of this children, "to conduct their education and raising," &c. &c.

The second item provides, that George Schley shall act as the guardian of the property of the children, &c. &c.

This will further appoints John Bones, Owen Fitzsimmons, George O. K. White and William J. Eve, executors, who had it admitted to probate on the 5th of May, 1851, Cunningham having died before that time.

On the 18th day of May, 1851, George O. K. White died, leaving a large estate and intestate; to one share of which estate, the children of said Cunningham were entitled, in right of their mother, the sister of said White, who died before her husband. William C. Poe administered on his estate, and this bill is filed by said George Schley, as testamentary guardian of the property of said children, under *Stat. Ch's*.

II. Plaintiff in error demurred to said bill, on the ground that it is not alleged in said bill, that complainant has been appointed by the Ordinary, guardian of said minors, for their distributive share of said George White's estate; nor does it appear, that he has given bond and security, under the statute.

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The Court over-ruled the demurrer; to which decision the defendant excepts.

POE, NISBET & POE, for plaintiff in error.

G. J. & W. SCHLEY, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] The question is, whether George Schley, having no right as guardian, except such as he derived from the will of Charles Cunningham, was entitled, as guardian, to demand of Wm. C. Poe, as administrator of Geo. O. K. White, the share of the estate of White which the minor children of Cunningham, after his death, inherited from White, who was their uncle.

The first section of the Act of 1851, "to secure the property of minors against the mismanagement of their guardians, by requiring bond and security," is as follows: "That from and after the passage of this Act, whenever any child or children shall have any guardian, by Statute appointed; or by the deed or will of the father or mother of said child or children, and any property shall descend to said child or children, by virtue of the Act of Distributions, or of any will, deed or gift, other than from said parents, it shall be the duty of the Court of Ordinary, executors, administrators or trustees, as the case may be, having the control of said property, to withhold said property from said guardian, until bond and good security be given, as in other cases of guardianship, to be judged of by the Court of Ordinary: Provided, that if such guardians shall fail or refuse to give such bond and good security, said Court may appoint some other fit and suitable person to act as such, first compelling said person to give bond and good security, as is now required in other cases of guardianship".

It does not appear that Mr. Schley had given the bond and security required by this Act.

It follows that he was not entitled to bring this suit against Mr. Poe, the administrator, if his case is within this Act.

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Is his case not within the Act? Does the Act include the case of no guardian, who was a guardian at the time of the passage of the Act? And Mr. Schley was a guardian at that time.

The words of the Act, taken fairly, will include guardians existing at the time of its passage. This will plainly appear, if, in reading the words, we omit those which I will enclose in brackets: "That from and after the passage of this Act, whenever any child or children shall have any guardian [by Statute appointed, or by the deed or will of the father or mother of said child or children,] and any property shall descend," &c.

And the words in brackets do not affect the sense, perhaps, at all. They seem to be intended to show the kinds of guardians meant to be reached by the Act—as all guardians appointed by the deed or will of a parent, and not to be intended to show that only some of each of these kinds were meant, viz—such as might come into existence *after* the passage of the Act. If they were intended merely to show the kinds meant, it may admit of a doubt whether they affect the sense at all; whether the kinds of guardians they express are not all the kinds which exist; and whether, therefore, the words amount to anything more than an enumeration of particulars which, if the enumeration had been omitted, would have been necessarily implied in the general words, "any guardian". It may be doubted whether, by the law of Georgia, there can be any guardian of property, except, perhaps, some temporary guardian, as one *ad litem*, unless that guardian be appointed under a Statute, or by the will or deed of a parent. See *Act of 1823, (Cobb, 322.)*

But certainly, if this were what the words were intended to show, then they do not so affect the sense as to make it exclude from the Statute, the case of a guardian who was existing at such, at the time of the passage of the Act.

And if the words will fairly take in the case of such a guardian, the reason will certainly do the same, and more so. The reason will no more allow the case of such a guardian

outside, than it will the case of a guardian appointed subsequent to the passage of the Act. The reason is, "to secure the property of minors against the mismanagement of guardians"; a reason which extends to guardians appointed before the passage of the Act, perhaps, in an especial manner, as it must have been the "mismanagement" of such constituted the mischief which occasioned the passage of the Act.

In the case of this guardian, Mr. Schley, therefore, was included within this Act.

Even if this Act did not exist, what is there to give Mr. Schley a right, as guardian, to make this demand upon Mr. Cunningham, the administrator. The will and the Statute of 12 Geo. II. (*Schley's Dig.* 242.). But the will appoints Mr. Schley to "act as the guardian of the *property*" of the minor, at the same time appointing other persons "personal guardians" of the minors themselves, and the Statute of *Charles* leave to the father "to dispose of the *custody* and *tuition* of the child or children"; that is, to appoint a guardian, not of the *property*, but for the *persons* of his children. Does the Statute, then, authorize Mr. Cunningham's appointment of Schley to the guardianship of any property, even such property as he, himself had, when he was making the appointment, or nothing of property which he never had, but which, at his death, was to fall to his children, by inheritance, from him? It is a most doubtful question, especially when it is remembered that Mr. C. had also appointed "personal guardians" for his children, and that the ninth section of the same Statute of *Charles* declares that the personal guardian shall have the profits of the children's lands, and the custody, &c. of their goods.

I think the demurrer ought to have been sustained to the writ, and therefore, that the judgment over-ruling the demurrer ought to be reversed.

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No. 34.—MATTHEW A. MARSHALL, assignee, plaintiff in error, vs. RHODA MORRIS, claimant, défendant.

- [1.] [2.] As to when secondary evidence is admissible, and as to what is good secondary evidence, in the case of a lost deed.
- [3.] *Lowe vs. Morris*, (13 Ga. R. 169,) on this same deed, approved.
- [4.] Ordinarily, a new trial will not be granted, merely because *irrelevant* testimony has been admitted.
- [4.] A marriage settlement is not within the Act of 1818, which prohibits assignments that prefer some creditors to others.
- [5.] To charge the Jury that marriage is a valuable consideration, and sufficient to support a deed; and that if the woman is guilty of no fraud, and enters into the settlement without notice of a debt, due from the man to a third person, she will be protected in the property conveyed by the settlement, against that debt, is not an erroneous statement of the law.
- [6.] A new trial will not be granted, when it must result in a verdict just like the old one.
- [7.] The Statute of 1850, to prevent Judges from giving to the Jury their opinions, as to what facts have been proved or not proved, does not reach the case in which a Judge, in the course of his charge, merely recites such of the facts in evidence, as are wholly undisputed.

Claim, in Crawford Superior Court. Tried before Judge POWERS, March Term, 1854.

This was a claim interposed by Rhoda Morris to certain negroes, levied on as the property of Richard Morris, her former husband, by a *f. fa.* in favor of James W. Marshall vs. said Morris, transferred to Matthew A. Marshall, the plaintiff.

On the trial, the plaintiff introduced the *f. fa.* transferred as aforesaid, and proved the negroes to have been, since the rendition of the judgment, in the possession of Richard Morris.

The claimant then offered a copy, from the records, of a deed of marriage settlement, made by Richard and Rhoda Morris, in contemplation of marriage; and for the purpose of laying the foundation for such evidence, she introduced, as a witness, Samuel Hall, Esq., who testified, that in 1843 or 1844, a marriage settlement between Richard and Rhoda Morris was in his possession; placed there for the purpose of defending the title of claimant to the same property, against other plain-

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him *sc. fa.*; that the paper, while in his possession, was
 ven in Court by the witnesses to it, to be the original; that
 a diligent search, he could not find it, and that the paper
 been destroyed or lost.

To the introduction of this copy the plaintiff objected, on the
 owing grounds:

1st. Because, in January, 1838, (at which time the deed was
 orted,) there was no Statute authorizing the record of such
 ers.

2d. That the witness, Hall, was not a subscribing witness
 the instrument; and that his testimony did not prove the
 stence of the original of the copy, now offered; nor does he
 ount for its non-production, if it did exist.

3d. That the instrument offered, created no estate in the
 mant.

These objections were over-ruled by the Court, and the copy
 admitted. To which decision plaintiff excepted.

The instrument thus given in evidence, was a deed dated
 c. 20th, 1837, between Richard Morris, of the first part,
 oda Jenkins of the second part, and Matthew A. Marshall (the
 intiff) of the third part, setting forth, that the two first
 ned parties contemplated marriage; that Morris had twelve
 tain named negroes in his own right, and that Rhoda Jen-
 s had four named negroes in her own right; and that "in
 er to secure the said named negroes to the use of the said
 oda, so that those owned by the said Rhoda, shall not, by
 son of the said contemplated marriage, vest in and become
 property of the said Richard Morris; and also, that the said
 cribed negroes, the property of the said Richard Morris, may
 vested in the said party of the third part, for the use herei-
 er mentioned". The deed went on, in consideration of the
 rriage, to vest in the said Marshall the whole sixteen negroes,
 i'trust for said party of the second part, and her heirs forever";
 it was likewise agreed between the parties, "that the said
 ty, of the first part, shall have the use and benefit of the said
 teen slaves, without account, for and during his natural life".

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F. H. Murdock then testified for claimant, that he was a subscribing witness to a marriage settlement, executed by Richard and Rhoda Morris, and Matthew A. Marshall, before the marriage of the first named parties, on the same day that all the parties signed it, but he did not read it, nor does he know whether the copy just read, was a copy of it or not.

Claimant then offered in evidence a declaration in a suit of Matthew A. Marshall vs. Richard Morris, on which was a judgment of non-suit; and also the declaration subsequently filed of James W. Marshall vs. said Morris; and the judgment thereon being the same on which the *fi. fa.* now levied was issued; from which declarations it appeared that the former suit was on a note of the same tenor as the latter.

This testimony was objected to as irrelevant, which objection the Court over-ruled and plaintiff excepted.

The plaintiff proved in rebuttal, by Thomas Andrews, that the negroes, conveyed in the marriage settlement, were the whole estate of Morris.

It was proven that the negroes levied on were the same conveyed in the marriage settlement by Morris, and that the debt on which the *fi. fa.* was founded, was in existence at the time of the execution of said settlement, being a note held by Matthew A. Marshall.

The testimony being concluded, the plaintiff's Counsel requested the Court to charge the Jury, that if the marriage settlement was made subsequent to the giving the note to Marshall, and if it conveyed all the property of Morris, leaving no means in his hands of paying the note, that a presumption of fraud was raised, which if not rebutted, would make the settlement void as to Marshall.

That when there are several parties to a conveyance, it may be fraudulent as to one and not as to another; and that before they can consider Marshall as implicated in the fraud, it must appear that he was the holder of the note at the time he signed the settlement; and furthermore, that he knew at the time, that the settlement covered the whole of Morris's property; and also,

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that he signed the settlement with a knowledge of its legal consequences, and not in ignorance of them.

The Court charged the Jury, that marriage is a valuable consideration, and sufficient to support a deed; and that if Mrs. Morris was guilty of no fraud, and entered into the contract without notice of plaintiff's debt, she will be protected in the property; and that if Marshall was the owner of the note, at the time he signed the settlement, it was his duty to give notice of it to Mrs. Morris; and having failed to do so, he is precluded from setting up any claim against the property.

The Jury found the property not subject, and plaintiff in *fa. fa.* except to the several rulings and charges of the Court as stated.

HUNTER; BAILEY, for plaintiff in error,

B. & R. P. HALL; POE, NISBET & POE, for defendant.

By the Court.—BENNING, J. delivering the opinion.

The record copy of the deed, contained in the record book, was properly admitted as evidence.

[1.] The loss of the original, was sufficiently shown by Mr. Hall's testimony. That testimony amounted to more than the rule of Court requires. The rule is, "Whenever a party wishes to introduce the copy of a deed or other instrument between the parties litigant, in evidence, the oath of the party stating his belief of the loss or destruction of the original, and that it is not in his possession, power or custody, shall be a sufficient foundation for the introduction of such secondary evidence". Such testimony as Mr. Hall's was worth more than would have been the belief of the party, that the deed had been lost or destroyed. That belief, besides being the belief of the person having the greatest interest to entertain such belief, might have been one founded on any reason; and therefore, founded on a reason not so good as that of a failure to find the deed, "after a diligent search".

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[2.] The loss of the original being sufficiently shown, the record copy, itself, was good secondary evidence.

This deed was signed by two witnesses—one of whom signed as a Justice of the Inferior Court. It bore date on the 22d day of December, 1837, and was recorded the 3d of January, 1838.

By the Act of 1827, (*Cobb's Dig.* 172, §3,) this deed is such a one as was admissible to record; indeed, it was admissible to record by the Act of 1819.

By the second section of the Act of 1837—25th December—(*Cobb's Dig.* 175,) it is such a deed, that if recorded within twelve months from the passage of that Act, "upon the usual proof of" execution, and then lost or destroyed, a copy of it might "be read in evidence, without further proof."

It is true that this deed was not recorded until after the expiration of more than twelve months from the passage of the Act. But then, by the first section of the Act of 1839, (*Cobb's Dig.* 177,) it is declared that this second section of the Act of 1837, shall be "continued of force, without limitation, as to the time of recording the deeds therein mentioned".

This second section of the Act of 1837, thus indefinitely extended by the Act of 1839, allowing "copies" to be read as evidence, of course allowed this record copy to be read as evidence—the record copy being, indeed, better than any copy taken from itself.

The Act of 1845, "for the admission of certain evidence in cases therein mentioned", has nothing to do with any question made in this case. (*Cobb's Dig.* 179.)

Nor has the Act of 1847, "to require marriage settlements to be recorded". This Act has certainly no operation, upon mere questions of evidence.

The formal objections to the deed being insufficient, was the substantial one sufficient? That was, that the deed conferred no separate estate on Mrs. Morris:

A construction, by this Court, has already been put upon this deed. In *Low v. Morris*, (13 Ga. R. 169,) this Court say, "The first question to be settled in this case is, what shall

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be the proper construction of the deed of marriage settlement entered into between Morris and his wife, prior to their marriage. The deed of settlement expressly declares that Morris shall have the use and benefit of the sixteen slaves mentioned in the deed, *without account for and during his natural life.* By the provisions of this deed of marriage settlement, the fee simple title to the negroes was vested in Mrs. Morris, subject to the life estate of her husband, Richard Morris, who was to have the use and benefit thereof during his natural life, without account. The life estate of Richard Morris, in this property, was therefore *liable for the payment of his debts*.

[3.] According to this view of the deed, Mrs. Morris *did* take a separate estate in the property. And this view of the deed we have seen no reason to disturb.

[4.] The only objection made to the admission, in evidence, of the two declarations was, that they were *irrelevant*. Admit that to be so; still, should a new trial be granted, merely on that account? In common cases, it is to be presumed, after verdict, that irrelevant testimony had no effect upon the Jury, in producing the verdict. There is nothing to show that this is not a common case.

We do not say, however, that this evidence was such as was not material for the claimant. On that point, it is not necessary to express an opinion.

[5.] This deed was not void by the Act of 1818, "to prevent assignments or transfers of property to a portion of creditors, to the exclusion and injury of the other creditors," &c.

That Act does not touch this case. Rhoda Jenkins, at the time when this deed was made, was not a *creditor* of Richard Morris. How, then, could the deed to her, or for her benefit, be one to prefer a creditor? The deed was made, not to secure a creditor in his debt, but to enable the maker of the deed to effect a marriage—was made in consideration of marriage. Such a deed is not within the letter or spirit of the Act of 1818.

Both parts of the charge to the Jury were objected to. The first part is in these words: "that marriage is a valuable con-

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sideration, and sufficient to support a deed; and that if Mrs. Morris was guilty of no fraud, and entered into the contract without notice of plaintiff's debt, she will be protected in the property".

The Statute of the 13 *Eliz.* "against fraudulent deeds," &c. (*Sch. Dig.* 214,) is the law which this charge violates, if it violates any.

That Statute is, for general purposes, well condensed by *Prince*, into the following words: "Every conveyance of real or personal estate, by writing or otherwise; and every bond, suit, judgment and execution, that shall be had or made to delay or defraud creditors and others of their debts and other rights, shall be void as against such creditors, &c. and themselves only. But the Act shall not extend to any conveyance for good consideration and *bona fide* to persons without notice of the fraud".

[5.] The charge is visibly within this Statute. Obviously, it does not offend against this Statute.

The other part of the charge is, in these words: "that if Marshall was the owner of the note, at the time he signed the settlement; it was his duty to give notice of it to Mrs. Morris; and having failed to do so, he is precluded from setting up any claim against the property".

The objection to this charge was, to the word "*precluded*". It was insisted, that notwithstanding Marshall might have owned the note when he signed the settlement as trustee for Mrs. Morris, yet, he was not estopped from attacking the settlement, unless he knew that "the settlement covered the whole of Morris's property; and also, knew what would be the legal effect upon his rights, of such an act, on his part, as that of signing, as trustee, the settlement."

But the settlement did not "cover", that is, convey Morris's whole property; it left in him a life estate in all that property. This is the fact—the fact apparent upon the face of the settlement, itself, which Marshall signed. And a matter assumed to exist in a case, but which does not exist in it, can

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not be made the ground of an objection to a decision in the case.

And while it may be true, perhaps, as a general principle, that a man must know the legal consequences of his act; that the act may estop him; yet, it is beyond doubt, also true, that every man *shall be presumed* to know the legal consequences of his act. Whether this presumption shall be a *conclusive* one or not, is another question, and one which calls for no decision in this case. Say, for this case, that the presumption is only *prima facie*. Then, if the Court had given the plaintiff the full benefit of it, the charge, in this respect, would have been, if Marshall held the note when he signed the settlement, he was estopped, unless he was ignorant of the law which made estoppel the consequence of such an act: but that until he affirmatively, on his part, showed himself to have been so ignorant of the law, it *was to be presumed* that he was *not* so ignorant of it.

Now, if the charge of the Court had taken this form, the verdict of the Jury, of necessity, would have been the same that it was under the form which the charge did take; for there is nothing in the case going to show that Marshall was ignorant of the law in question.

[6.] A new trial will not be granted, when it must result in a verdict just like the old one.

What is thus said of the *charge*, disposes of the *requests to charge*.

It was also argued, that "the Court erred in telling the Jury what had been proved".

The part of the charge which it was argued did this, is the following: "The note being made payable to Matthew A. Marshall, is presumptive proof that he held the same, at the date of the settlement; also, that he had sued upon the note, and the *fi. fa.* being transferred back to him, all go to show that the note was in his hands at that time."

Does this amount to the expression or the intimation of an opinion, on the part of the Judge, that the particulars recited in this general way, had been proved? (*Cobb's Dig.* 462.)

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The most that can be said of the charge is, that it *silently assumes* the particulars to be true; that it treats them as *undisputed facts*. And such they were. And strictly speaking, to assume a fact as true, is neither to express nor to intimate an opinion, that the fact has been proved. Suppose the Court had said these particulars are true, to my certain knowledge; but they have not been proved to be true? Such a statement, however wrong, would not be inconsistent, in itself, nor would it be a violation of the Act aforesaid.

This charge, then, is not within the words of the Act of 1850. And can it be said to be within the meaning—to belong to the mischiefs the Statute was intended to remedy? The Act could never have been intended to prevent the Court from assuming, as true, for the convenience of charging a Jury, those facts, of which there are many, in almost every case, about which there is no dispute between the parties. It must have been intended to prevent Judges from expressing or intimating their opinions, as to whether *disputed facts* had been proved.

For the expression or intimation, by the Judge, of his opinion, as to whether such facts had been proved or not, might, and probably would, have some effect in shaping the verdict; as the Jury would, it is likely, be influenced more or less by any thing coming from the Court. But the expression or intimation of the Judge's opinion, as to undisputed facts, could not possibly have any effect in shaping the verdict.

Suppose both parties say to the Jury, we admit this and this fact to be true, and the Court, when it comes to charge, merely in the course of the charge, mentions what is thus admitted; is it possible to say, that although the words of the Statute do not reach this act of the Judge, the intention does; and therefore, a new trial is to be granted?

[7.] The Statute, we think, does not extend to a case where the Judge, in the course of his charge, merely mentions such facts in the evidence, as are wholly undisputed.

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35.—ICHABOD H. ALBERTSON et al. plaintiffs in error, vs. THOMAS HALLOWAY, for the use of David Halliburton, defendant in error.

A plea of failure of consideration, without fraud, may be pleaded to a note which is a joint and several promise to pay by two, which purports to be over the hand and seal of the makers, and has a seal or scroll affixed to the name of one, the other signing with his own proper hand, as security.

Debt, in Houston Superior Court. Tried before Judge Smith, April Term, 1854.

This was an action of debt, brought by Thomas Halloway, for the use of David Halliburton, against Ichabod H. Albertson and Stephen Brown, on the following note:

On or before the first day of January next, we or either of us promise to pay, or cause to be paid, unto James Halloway, the sum of Eleven Hundred and Fifty Dollars, for value received. Witness our hand and seal, this the 12th day of March, 1854.
 ICHABOD H. ALBERTSON, [L. s.]
 STEPHEN BROWN, Sec'y.

Fitness, D. P. SMALL."

In this action the defendants pleaded the general issue—denial, and partial failure of consideration. On the trial, plaintiff moved to strike the defendant's plea of "partial failure of consideration," on the ground that no fraud or illegality was alleged in the contract, and the same was under seal. The Court sustained the motion, but allowed the defendants to amend their plea, by charging fraud in the contract, on which the note was founded, and plaintiff excepted.

Plaintiff then read the note to the Jury and closed. Defendant then read in evidence the testimony of Dempsey Small and two other witnesses, taken by interrogatories, in the case.

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substance, "that the note sued on was given to Halloway for two negroes, Westly and Ann; the former, valued at the time of the sale, at \$790, and the latter at \$450. Had known Ann from the time Albertson purchased her, and she has been, during the whole period, afflicted with rheumatism—unable to work, and worth nothing; at the time of the trade, Halloway said her feet were sore from travelling." The defendant then read in evidence a bill of sale from Halloway to Albertson warranting the soundness of the two negroes, Westly and Ann, dated the 12th March, 1847.

The defendant introduced other witnesses, all testifying that the girl Ann, in her condition, was worthless; but that if sound and healthy, was worth \$400.

The plaintiff then read in evidence the answers of Albertson, one of the defendants, to a set of interrogatories filed against him, as follows: "that he did, while Halliburton held the note as agent for Halloway for collection, ask him for indulgence on the note; and at that time, it was his intention to pay it, but the negro Ann continuing to be worthless, he changed his mind and determined not to pay so much of the note as included the price of Ann, and so informed Halliburton, who, thereupon, commenced suit on the note.

Wm. H. Miller, sworn, testified, "that the parties, Halliburton and Albertson, were together at one time, attempting to settle the matter; and Albertson stated to Halliburton, that he was sorry that he had not notified him sooner, or before he, Halliburton, had bought the note, that he intended to defend it."

It was admitted that Halliburton had paid the note to Halloway, who was suing for the use of Halliburton.

The defendant requested the Court to charge the Jury, "that if the consideration of the note had partially failed, they should deduct from it the price agreed to be paid for Ann, if she was proved to be wholly unsound." The Court refused so to charge, but did charge, that the instrument sued on, being under seal, partial or total failure of consideration could be pleaded, only in case of fraud or illegality in the transaction.

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fraud had been plead and relied on, and if they were satisfied from the evidence, that a fraud was perpetrated on the defendant in the sale of the negro by plaintiff, then they should as defendant requested the Court to charge.

which charge, Counsel for defendant excepted, and upon this exception error has been assigned.

WARREN, for plaintiff in error.

MR. M. GILES, for defendant in error.

the Court.—STARNES, J. delivering the opinion.

] We believe that the rule, that a plea of failure of consideration cannot be used as a defence to a specialty, applies to other instruments, save such as were known to the Common Law as specialties; as deeds, bonds and instruments executed with like solemnities of *sealing and delivery*.

It has been common for Courts to say that such defence can be set up to an *instrument under seal*. But we think that the words were used, or should have been used, with reference to such instruments as were executed with the ceremonies necessary to specialties at Common Law.

The rule which forbids the plea of failure of consideration to a specialty, had its origin at a time when the Common Law attached the utmost importance to the ceremonies necessary to the execution of every such instrument; and the ceremonies performed by acts formal, significant and solemn. In the course of time, as the execution of such instruments became frequent, and was brought more into relation with the everyday business of society, the *method* of these ceremonies was relaxed in its formality, but still, something that was considered equivalent thereto, was required. Such is still the requirement of the Common Law.

Let us see what is this requirement, as to specialties. A specialty is a writing, *sealed and delivered*, containing some agreement. (1 P. Wm. 13. *Willis*, 189.) "Sealing and

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delivery is still the criterion of a speciality." (2 *Serg. & R.* 503.)

A seal may be represented by almost anything purporting to be a seal; and delivery may be manifested by almost any thing which affords evidence that a delivery was intended. But still the requirement is, that in specialties the solemnity of sealing and delivery, as known to the Common Law, shall be represented by something intended to have that effect.

Now, the elementary Common Law reason why the consideration of a speciality could not be denied was, that "the solemnity and deliberation with which, on account of the ceremonies to be observed, a speciality is presumed to be entered into, attach to it an importance and a character which do not belong to a simple contract." (*Ch. on Con.* 4.) Hence, it has been held, that in general, no consideration is requisite to render a speciality obligatory, unless it be impeached for fraud or illegality, and that it cannot be defeated by proof of either partial or total failure of consideration. (*Plew.* 308. 2 *Black Com.* 446. *Ch. on Con.* 5. *Fallows vs. Taylor*, 7 *T. R.* 415, 417.)

All the cases which I have seen, (and they are many, both in England and the United States) where this rule has been maintained, apply to such instruments as were specialties at Common Law. And when Courts and Commentators apply the rule to "instruments under seal," it will be found that they are really speaking of such as were specialties at Common Law. Instruments under seal, at Common Law, were always such as were intended to be accompanied with other solemnities and ceremonies, necessary to give them effect; and hence, by a figure of speech, quite common, the class has been designated by one of its characteristics, viz: *sealing*.

But we can conceive, that in process of time the exigencies of trade and commerce, or mercantile usage, or the customs of a people, among whom the credit system prevailed to a great extent, might have rendered common, as an evidence of contract, an instrument possessing but one of these characteristics of a speciality at Common Law, in which either the solemnity

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of sealing or that of formal delivery, was dispensed with. In such case, there seems to be no reason why such instrument should not be binding on its maker—not as a specialty is binding, but only as evidence of the contract, according to its terms.

Let us suppose, then, that in the multiplicity of the concerns of advancing trade and commerce, a debtor found it expedient to negotiate with his creditor, informally and without delivery, in the presence of witnesses, an instrument signed by him and under his seal, having such terms as were not appropriate or common to instruments, known as sealed instruments, or specialties at Common Law—the terms of the instrument being a promise to pay a sum of money, absolutely and at all events, to the creditor, or any one who might hold the same, on a day specified, in consideration of some advantage or benefit, to him, the maker.

Such an instrument would certainly be a good promise to pay by the maker; but it would be purposely wanting in one of the Common Law characteristics of a specialty. It would not be a bond or obligation, in the sense that Lord Coke says that word “is usually taken in the Common Law”; for that is an instrument containing a penalty, with condition to pay a sum of money. (*Co. Litt.* 172. *Bac. Abr. Oblig. A.*) It would not be a bill obligatory, which might be sometimes under seal; and according to Coke, “most commonly taken for a single bond”. It could be neither of these, inasmuch as it would be, in terms, a promise to pay a sum of money for a valuable consideration, absolutely and at all events, on a day fixed, (which is the characteristic of a promissory note: *Bayley on Bills*, 1 *Story on Prom. N.* §12,) and it would not have been formally delivered.

This is just the sort of instrument which is in common use, and known as a promissory note, under seal. A seal is affixed to it; perhaps, with reference to the Statute of Limitations; but from its very terms, the instrument is intended to be negotiated, especially when payable to bearer, without the solemnity practiced at Common Law, in the execution of specialties,

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and especially without any solemnity as to delivery. Of course, it must be delivered; that is to say, it must pass from the maker, in order to have effect: but it is not passed to the payee, as the specialty at Common Law was passed to the grantee or the obligee, with that formal ceremony or its equivalent, necessary to give effect to the latter instrument.

It is somewhat difficult to classify this instrument, (a note under seal) for it is not a promissory note, as that is never under seal, we are told. (2 *Bouv. Dic.* 579.) It seems wrong to place it with agreements by parol; and all contracts, it is said, must be either agreements by specialty, or agreements by parol. *Rann and another vs. Hughes*, (7 *D. & E.* 350.) This is certainly true in the light of the Common Law. Still, as we have shown, it is quite as difficult to place such an instrument among specialties. It would seem, therefore, that that which is called a promissory note under seal, is, in the eye of the Common Law, anomalous. It is a sort of spurious offspring from the specialty and the promissory note, whose legal status it is not easy to define.

With reference to the Statute of Limitations, we believe that such an instrument has been sometimes called a specialty, and subject only to the Statutory bar applicable to such instruments. Whether it was rightly called a specialty or not, the decision was correct, for the Statute (our act of 1839) applies the bar of 20 years, not to specialties, but to "bonds or instruments under seal."

Perhaps the view we have taken, will be strengthened by a consideration of our legislation on the subject, and the unvaried practice of our Courts. The Judiciary Act of 1799 (*Sec. 25th*) makes promissory notes and other liquidated demands, of equal dignity with bonds and other specialties. The latter, then, in our State, because of the "solemnity and deliberation" with which they are executed, are of no higher consideration than promissory notes. Yet we know that the rule we have been considering, has not been applied to ordinary promissory notes, but that it has been the immemorial practice, in our State, to allow pleas of total failure of consideration (and of partial

Albertson et al. vs. Holloway, for use, &c.

failure, since the Act of 1836) to suits on such notes. Must not this have been upon the principle, that the rule we have been considering was applicable to such instruments as possessed the Common Law incidents of specialties, and to none others?

On the whole, it would seem that a promissory note, under seal, intended to be negotiated and put into circulation from hand to hand, without formal delivery, has not the characteristics of a specialty at Common Law, and that a failure in the consideration of the same may be pleaded.

But whether we are right in this view or not, we feel very sure that the note sued on, in this case, cannot be classed with specialties at Common Law, and must be regarded as anomalous.

In its terms, it is a joint and several promise to pay by two, purporting to be over the hand and seal of the makers, and signed and sealed by one—the other *signing* only, and as security.

Now, it is doubtful whether or not, as to one of these defendants, this is a sealed instrument. For we are told by some eminent Courts, that “although in the body of the writing, it is said that the parties have put their hands and seals; yet, it is not a specialty, unless it be actually sealed and delivered.” (2 *Serg. & R.* 503.) And so, it was not at Common Law. Whether this be the law, in our State or not, need not be decided. Suffice it to say, that this instrument, in its form, tenor and mode of execution, deviates from all rules established by Common Law principles, as applicable to specialties, and, in character, was unknown to the Common Law. The rigid Common Law rule, therefore, which forbids that the consideration of a specialty should be denied, cannot appropriately be held applicable to it.

Judgment reversed.

Moseley vs. Gordon.

No. 38.—MALCOLM A. MOSELEY, plaintiff in error, vs. SILAS GORDON, defendant.

- [1.] When a witness swears that he has seen the instrument presented him, before, and was present when the same was executed: *Held*, that it is equivalent to an affirmative statement, that by ocular proof, the witness knew that the instrument had been executed in his presence; and that the contrary were true, and could be supported by evidence, the witness might be convicted of perjury.
- [2.] Testimony, by itself vague, and apparently relating to matter not in issue, may be made certain in its character, and plainly relevant, by other facts in proof.
- [3.] Where A, acting as the agent for M, in the sale of a negro slave, executes, with D A, a joint sale of said slave and another, belonging to the said D A, in exchange for a slave of G; and the two make and deliver to G their joint bill of sale, in which they warrant the soundness of both slaves, signing the instrument A and A; and afterwards, action is brought by G against M; for a breach of said warranty, on account of the unsoundness of the slave sold for M; *Held*, that though A may have transcended his authority, as agent, in uniting with D A in said sale, and in jointly, with him, warranting the slaves conveyed; yet, that inasmuch as he was authorized, by M, to sell and warrant his slave, and there was no transgression of his powers, as agent, in selling and warranting that slave, effect will be given to the deed against M, so far as that slave is concerned.
- [4.] Testimony of a man's general character and reputation, in the treatment of his slaves, is nothing more than hearsay testimony, and is inadmissible.
- [5.] Where suit is brought upon an alleged breach of warranty, on a sale and purchase of a negro slave, and there is some testimony from which it might be inferred, that the slave was of no value at the time of sale; and also testimony, in another view, which might be taken by the Jury, sufficient to authorize the presumption, that the slave was not altogether valueless at the time, but no evidence was offered, going to fix any amount of such value, or furnishing any data by which the same could be ascertained: *Held*, that it was not error in the Court to charge the Jury, that "if the seeds of the disease were in the negro, at the time of the sale, though not developed until afterwards: but if the negro afterwards died of that disease, which was then upon him, this would be a breach of the warranty", inasmuch as the Court connected this instruction with the further charge, that "they must be satisfied, from the evidence, that the negro was of no value, at the time of the sale, or they must find for the defendant".

Assumpsit, in Troup Superior Court. Tried before Judge WARNER, May Term, 1854.

Mosely vs. Gordon.

This action was brought by Gordon against Mosely, to recover the value of a negro sold by defendant to plaintiff, with warranty of soundness.

The following is the bill of exceptions:

Be it remembered, that the above cause was called in its order for trial, on a day in said term when both parties announced ready. The plaintiff opened his case, and offered and read evidence to the Jury the following testimony, by commissions taken, to-wit: The deposition of one Isaac F. Gordon, offered to prove the execution of the bill of sale:

1st. He knows the plaintiff but not the defendant. 2d. He has seen the bill of sale before, (a bill of sale, a copy of which hereinafter set forth, was attached to the interrogatories,) and was present when the same was executed by Allen & Adams. He knows of the plaintiff's purchasing two negroes from said Allen & Adams—one, a boy, named Daniel, valued at one Hundred and Fifty Dollars; the other, a boy named Tom, valued at Four Hundred and Fifty Dollars; and that a bill of sale, annexed, was given at the time of said purchase. The boy Daniel was, he supposes, some thirteen or fourteen years of age, and the boy Tom about twelve years of age. Allen & Adams did not disclose to plaintiff or any other person, at time of purchase; that they were acting as agents for Mosely, or that the defendant was the owner of said negroes. Cross-interrogatory: He answers, plaintiff is his father.

To the reading of these interrogatories defendant objected, because the witness did not prove the facts necessary to show the legal conclusion—the execution of the bill of sale; and because he did not say he saw it executed. He might have been present at the time specified in the bill of sale, and yet not have seen or known anything about its execution; and because, admitting the execution of the bill of sale, as testified to by his witness, yet, it did not make the defendant liable, nor move the case made by the pleadings. The Court over-ruled the objections, and permitted the interrogatories to be read to the Jury, and the defendant excepted.

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The deposition of one John C. Simmes and Tollerson Kirby, by the same commission, taken thus: 1st. John C. Simmes knows the parties. 2d. That he heard defendant say that his agent, Mr. Adams, traded a negro boy to plaintiff, and that Mr. Allen acted with his agent, Mr. Adams, in said sale. The defendant stated that the boy traded was his property. The conversation, to the best of his belief, took place in March, 1849. Defendant said nothing more, in reference to said sale, than is already stated. The defendant stated that he was the owner of the boy sold, and that Adams acted as his agent.

1st. Tollerson Kirby knows the parties. 2d. He answers that the defendant stated to him that Mr. Adams and Mr. Allen swapped two negroes to the plaintiff for one, and that one of those boys swapped belonged to him, the defendant, and the other to Mr. Allen. This conversation, he believes, occurred some time in the year 1849. He answers, that one of the boys swapped to the plaintiff, was stated, by the defendant, to have belonged to the defendant. The defendant said nothing about any person's acting as his agent. 3d. Neither of them knew anything more.

The defendant objected to this testimony, as proving nothing; and that if it proved anything, it proved a different contract from the one sued on and testified to by Gordon—this being a *swap*, which was different from a sale, &c. The Court over-ruled these objections and permitted the interrogatories to be read; and to this the defendant excepted.

Next, plaintiff introduced and read in evidence the depositions of Andrew B. Calhoun, by commission duly taken, to-wit:

1st. He answers, I am well acquainted with the plaintiff in this claim, and have a slight acquaintance with the defendant. 2d. He answers, I have been a practitioner of medicine for upwards of twenty years, but abandoned my profession at the commencement of the present year. My location, since the year 1833, has been in Newnan, Coweta Co. Ga. 3d. He answers, I have, at different times, for many years, practised in the family of plaintiff, but do not now recollect to have attended,

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at any time, on any of the negroes, except a boy named Daniel, to whom I first gave medicine on the 11th of May, in the year 1848. The boy was shown to me two or three weeks before I put him upon any regular course of treatment. General dropsy appeared to be the disease under which he labored, when I first saw him, accompanied with a painful affection of the joints, of a rheumatic character. After administering medicine to him for a short time, I succeeded in reducing the dropsical swelling. A good opportunity was then afforded of examining into the condition of his liver, and other important organs of the abdomen. The liver was then, for the first time, discovered by me to be materially enlarged, as also the mesenteric glands, spleen, &c. In this situation, I took Daniel to my own house, in Newnan, and kept him there, under treatment, until he died, which occurred some time in the early part of August, 1848. The general symptoms characterizing Daniel's case, when I first saw him, and subsequently, during the whole progress of his disease, induced me to believe that he had been diseased for a considerable length of time. How long he had been diseased, it is impossible for me to say; I think, however, he could not have been in the condition he was when I first saw him, without having been diseased long anterior to the December or January preceding. 4th. He answers: I have stated, in a previous interrogatory, the time at which I think the boy died; the amount charged by me for attendance on the boy, was twenty-four dollars and seventy-five cents. 5th. He answers: I know nothing more than I have stated already, that will go to show that Daniel was laboring under the disease of which he died previous to the December or January preceding his death. I do not think he could have been of any value to plaintiff, for months previous to the time I first saw him. I knew of no amount expended by plaintiff, in attempting to cure the boy, except what he paid to me.

1. He answers: I do not think the disease under which Daniel labored, very deceptive in its character, nor do I think that extensive visceral disease of the abdomen could be contracted

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by great exposure, in any very short space of time, more especially when it is of that chronic character which Daniel's case presented. 2d. He answers: The opinion advanced by me in reference to the length of time Daniel had been diseased, is a mere opinion, and may be incorrect. I think, however, that but few medical men could be found, who would so far disagree with me as to controvert the opinion advanced by me. 3d. I know nothing more that could benefit either of the parties, &c.

The plaintiff tendered in evidence a bill of sale, of which the following is a copy: "Received of Silas Gordon One Thousand Dollars, in full payment of the purchase of two boys, named Daniel and Tom; the right and title of the said boys we warrant to be good; and also warrant them sound, both in body and mind, and slaves for life".

(Signed)

ALLEN & ADAMS.

January 24, 1848.

To the reading of this bill of sale in evidence defendant objected, because the execution of it was not proven, and because it did not, under the evidence, or on its face, bind the defendant as sued in any manner, nor make him liable on its breach, and was not admissible evidence under the allegations, &c. The Court over-ruled the objections, and permitted the bill of sale to go to the Jury; and to this defendant excepted.

Plaintiff introduced Robert W. Simmes, who testified that in the early part of the year 1850, (after suit was brought) defendant told witness that the boy Daniel belonged to him; that Allen & Adams had no right to make any such bill of sale, but that it made no difference, as he could prove the boy was sound.

Plaintiff closed his case. Defendant opened and introduced Dr. Robt. A. T. Ridley, a practicing physician of long standing, who testified that he had heard the testimony of Dr. A. B. Calhoun read, (and it was re-read to him) and that from the symptoms of the boy Daniel's disease, as described by Dr. Calhoun, witness was of the opinion, as a medical man, that the boy died of dropsy. (The witness then gave a minute description of the different kinds of dropsy—its nature, origin, and

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the causes which produced them.) He believed the case of Daniel was produced by exposure, neglect, &c—that kind of dropsy was generally produced in that way, and was most generally germinated in the last of the winter and first of the spring months, when winter and spring seemed to be contending for the mastery of the seasons, and the weather and temperature underwent frequent changes. Witness had met many cases of the kind, and sometimes they were produced in a short time, and he thought, from the symptoms of Daniel's case, it might have originated in a few weeks before the time Dr. Calhoun first saw him, or it might have been of long standing—it was impossible, as Dr. O. said, for any physician to say how long it had existed. Witness was the physician of defendant. Defendant was very careful with his negroes, and frequently sent for witness, professionally, when it was really not necessary. Had never been called to see Daniel. Perhaps had seen him—never knew him to be sick. Witness was of opinion that exposure to bad weather, over labor, late hours at night, with bad treatment and indifferent clothing, was well calculated to produce such a disease, as Daniel's especially in the winter and spring season of the year. The disease is almost incurable when neglected and allowed to take strong hold of its victim—but that it is frequently and easily cured if treated in proper time, and there are good preventive medicines. Witness was further of opinion that the chances of curing Daniel were much diminished by the failure to have him treated when Dr. Calhoun first saw him.

CROSS-EXAMINED: Said there were many diseases which a physician could not understand properly, without seeing them, and there were others which he could treat and understand as well in his office, and by prescription, as any other way—that dropsy was a disease which could be treated by prescription, and a correct opinion of its nature, cause and character could be formed by a description of its symptoms; especially when given by another physician. That Dr. Calhoun belonged to the first class of physicians in this country.

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The defendant then read in evidence the depositions of John B. Duprey, by commission legally taken, as follows :

1st. He answers : I am not acquainted with either of the parties well, and know only Mr. M. A. Mosely, the defendant, whom I have often seen in Charlotte Co. Va., where he resides. I have never seen Mr. Gordon. 2. He answers : I did know a negro boy named Daniel. I raised him and sold him to Bacon & Mosely, of which firm M. A. Mosely, the defendant, was a partner. He was 9 years old in 1847, when I sold him, although he looked to be older. He was uncommonly likely and of dark brown complexion. I knew him from the time he was born till the first Monday in June or July 1847, when I sold to Bacon & Mosely at Charlotte C. H. Va., by whom, or by one of whom, (Mr. Mosely,) he was carried to Georgia in that fall, as I suppose. He was larger than boys usually are at 9 years of age, and was what I would call *number one*. 3. He answers : I knew the boy Daniel from the day of his birth to the day I sold him. I am a planter and stay at home pretty closely, and saw him nearly every day—these are the opportunities had of knowing his health—and I can state with certainty that he was as healthy a boy as I ever knew, and was perfectly sound. He had never been sick, to my knowledge, at all, except when he was a child, he may have had a cold like other children ; but never was he so sick as to keep him from going about—and I pronounce him as healthy a boy as I ever knew. His family was very healthy, and he was perfectly sound when I sold him. 4. He answers : I have read the annexed release and accepted it before my deposition was commenced, and signed my name on the back of it towards accepting it—and of course before I testified. 3. He answers : That he has stated above the facts of the case, as known to him, and he can only say that the boy was sound as a dollar, and he sold him as above stated.

And then also, was read in evidence the depositions of Russel Lane, by commission legally taken, as follows, to wit : 1. He answers : I knew Malcomb A. Mosely. 2. He answers : The boy Daniel lived with me for three or four months last

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preceding his departure for the South, and I was acquainted with him for that time. He never was sick while he lived with me. He looked well and was hearty during that time. He was of dark complexion—not as dark as I have seen—though dark. 3. He answers nothing. 4. He answers: I lived in the county of Halifax, State of Virginia, at the time the boy lived with me. I now reside in the adjoining county of Charlotte, Virginia. As to the age of the boy I know nothing—but his health was good. 5. I know nothing more.

The defendant then read in evidence the testimony of Paul V. Adams by commission legally taken, as follows: 1. He knows the parties. 2. I know the boy Daniel and supposed he was about eight or nine years old, and I travelled in company with him from the county of Charlotte in the State of Virginia, to Troup county in Georgia, in the fall of 1847; and I swapped said boy Daniel to Silas Gordon some time in the spring of 1848—said boy Daniel was carried to Georgia by Malcom A. Mosely and myself; I having been employed by said Mosely and Capt. William Bacon to aid Malcom Mosely in getting his negroes to Georgia. 3. I was with the boy about six months, and I believed him to be sound, and I never heard him complain during the time I was with him. 4. Nothing. 5. He was swapped to Silas Gordon and rated at five hundred dollars. 6. He answers: I believe he was sound and healthy, both in body and mind, as far as my knowledge of him extended—during a period of about six months, which time I was with him, I never knew him, Daniel, to be sick, and believe if there was a sound negro in the drove he was one.

Cross-Answers.—1st. He answered: I swapped said boy Daniel to Gordon, as the agent of Mosely & Bacon, and I did make a bill of sale, and warranted him sound; and I am not interested in making it appear that the said boy was sound, at the time of sale, having no interest, whatever, in the negroes—only acting as agent for Mosely & Bacon, as before stated. 2d. I have not, and knew nothing of his being swollen before the sale. 3d. I know of nothing that will benefit plaintiff, other than that I gave a bill of sale in my own name: Trav-

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elling in company Mr. David Allen, and he a trader also, we made a joint trade with Gordon, swapping him two negroes for one—said Allen owning one, and Mosely & Bacon the boy Daniel, for which negroes we gave a joint bill of sale—he, Allen, representing his own interest and I representing the interest of Mosely & Bacon. Further this deponent saith not. Defendant proved that he did not leave here in 1848, until some time in June.

The defendant introduced Robert W. Simms, John L. Stephens and Robert J. Morgan, by whom he proposed to prove the general character and reputation of Silas Gordon, the plaintiff, for his bad and cruel treatment of his slaves, generally; and furthermore, offered to prove by said witnesses, that said plaintiff had been indicted, for cruel treatment to his slaves. All which testimony being objected to by plaintiff, was rejected by the Court; and to this decision the defendant excepts. Defendant closed; and after argument, the Court charged the Jury, among other things, "that (on the question of soundness) if they should believe that the *seeds* of the disease were in the negro, at the time of the sale, though not developed until some time after the sale, but afterwards died of this same disease that was upon him at the time of sale, would constitute a breach of the warranty of soundness". To this charge of the Court defendant excepts.

The Court further charged the Jury, "that in an action on a warranty of soundness of a slave, the measure of damages is the difference between the price paid and the actual value of the negro in his unsound condition, at the time of the sale, with interest to date; and if the negro was of no value at the time of the sale, then the measure of damages was the price paid, with interest". The defendant's Counsel insisted, in the argument before the Jury, that in this case the plaintiff was bound to prove, positively, that the negro was of no value, at the time of sale, or he could recover nothing; and that keeping the negro and failing to return him, or offer to return, was evidence of some value; and after the argument, defendant's Counsel requested the Court to charge the Jury: "That

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the burden of proof was on the plaintiff, and that, unless the plaintiff had proven that the negro boy, at the time of sale, was of no value, they must find for the defendant'. . . And the Court charged the Jury, "that in this case they must be satisfied, from the evidence, that the negro was of no value, at the time of sale, or they must find for the defendant;" and to this the defendant excepts.

The Jury returned a verdict for the plaintiff, and the defendant insists that the same is erroneous and should be set aside, and a new trial had: 1. Because the Court admitted the testimony of Isaac F. Gordon to be read to the Jury, to prove the execution of the bill of sale. 2. Because the Court erred in admitting the testimony of John C. Simmes and Tolbert Kibby to be read to the Jury. 3. Because the Court erred in permitting the bill of sale to be read to the Jury. 4. Because the Court erred, in refusing to allow the evidence offered by defendant, of Simmes, Stephens and Morgan to go to the Jury. 5. Because the Court erred in charging the Jury as it did charge, and in not charging as requested. 6. Because the verdict is contrary to law and to evidence, and without evidence. 7. Because the verdict is contrary to the charge of the Court; and 8. Because the verdict is contrary to the clear and decided weight of evidence.

HILL, E. Y. HILL & SON, for plaintiff in error.

STEPHENS, for defendant.

By the Court.—STARNES, J. delivering the opinion:

[1.] Error is first assigned in this case, because the Court below admitted the testimony of Isaac F. Gordon, taken by commission.

It is contended that this evidence should not have been submitted to the Jury, because the witness did not state facts sufficient to show the execution of the bill of sale; that according to his statements, though he was present, it does not appear that he saw the instrument executed.

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It is true, he does not say, in explicit terms, that he saw the parties affix their signatures, but he says what is tantamount thereto. He states, that he had seen the instrument presented to him before, and that he was present when the same was executed. This is plainly to be understood as an affirmative statement, that the instrument to which he is testifying, and which he identifies, he knows, by ocular evidence, to have been executed in his presence. No other reasonable construction can be placed upon the statement, as we find it in the record; and there can be no doubt that if this were not true, and the same could be shown by proper evidence, the witness might be convicted of perjury.

[2.] It is next alleged, that the Court committed error in admitting the depositions of John C. Simmes and Tolleason Kirby.

It is correct, as stated, that the name of the slave, concerning whom these witnesses testify, is not given by them: nor is the time stated, of the purchase, to which reference is made, but only the time of the conversation. There are circumstances, however, in other portions of the testimony, which go to show what slave was spoken of, and also what purchase was the subject of conversation, and it was no doubt, with reference to these other features of evidence, that the Judge permitted this evidence to be considered by the Jury.

Testimony, by itself vague, and apparently relating to matter not in issue, may be made certain in its character, and plainly relevant, by other facts in proof. And that before us, falls within this description of evidence.

The witness, Kirby, speaks of Adams as having *swapped* the slave to plaintiff; and it is insisted, that this could not have been the same transaction with that spoken to by the other witnesses, as that was called a purchase. But a "*swap*" or "*exchange*" may, in general terms, be called a *sale*. And he who, by such a transaction, exchanges, barter, or "*swaps*" one article for another, may very correctly be said to procure that article by purchase. The only technical difference, indeed, between a sale, and an exchange or barter, is, that "in

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the latter, the price, instead of being paid in money, is paid in goods or merchandize, susceptible of valuation". (2 *Bowe. Dec.* 479.) In this sense it was, without doubt, that this transaction was called a purchase.

[3.] It is also alleged that error was committed by the admission of the bill of sale in evidence—1. Because, as was contended, the same had not been proven to have been executed. 2. Because, as was insisted, it was not binding on the plaintiff in error, being an instrument executed by Allen & Adams, as co-partners, and not as agents for plaintiff in error.

The execution of the instrument is sufficiently proven; as we have already shown.

The other point raises a question of more importance. It is very plain, from the record, that one of the slaves conveyed by this bill of sale, belonged to the plaintiff in error, and was sold by Adams, who, as his agent, had full authority to sell and warrant him. The other seems to have been the property of Allen. According to the statement of the witness, Adams, he and Allen made a joint trade with the defendant in error, "swapping him two negroes for one"; that Allen owned one of the negroes sold, and plaintiff in error, for whom he was acting as agent, the other, viz: the boy Daniel, the subject of this suit; and that they "gave a joint bill of sale" for the same.

The legality of this transaction is the matter now in question. Was this bill of sale, as thus executed, binding and valid, as against the plaintiff in error?

We have two observations to make in reply to this question.

1. It seems to have been the intention of the agent, by this form of conveyance, to give a good title, with warranty of soundness to the purchaser. *Prima facie*, the transaction is a co-partnership transaction; but the evidence explains this, and shows that that which appears to have been a partnership transaction, was really not so; but was probably made to take this form for the sake of convenience. It would seem very reasonable and just, after such proof, that effect should be given to the instrument accordingly; and that the substantial justice

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of the transaction should not be defeated by the technical form of its execution.

2. If this be not correct, we are very sure, that according to this record, Adams, as agent, had authority from the plaintiff in error, at least, to sell and warrant the slave Daniel in the usual form; and that if, in selling him as he did, he transcended his authority by forming a partnership *pro hac* with Allen, in the sale of the two slaves, the act should be void only so far as he thus transcended his powers, and remain valid, as a sale and warranty of Daniel by him, as agent for the plaintiff in error. (*Paley, on Agency*, 164. *Story on Agency*, §§85, 126.)

It was urged that the testimony proved an agency in Adams, for Bacon & Moseley, and not for Moseley alone: but, on this subject, we find that the evidence is somewhat conflicting. It was proper for the Jury to determine this question; and the remarks which we have made, proceed upon the supposition, that Adams was found, by the Jury, to have been the agent for the plaintiff in error; a finding that, in our opinion, the evidence would have fully authorized.

[4.] It was next objected, that the Court erred in rejecting the testimony of Robert W. Simmes, John L. Stephens and Robert J. Morgan. By these gentlemen, it was proposed to prove "the general character and reputation of Silas Gordon, for his bad treatment of his slaves," and also, that "he had been indicted for cruel treatment of his slaves."

It will be observed, that it was not proposed to show, by these witnesses, that from their knowledge of defendant in error, and his slaves, he was in the habit of treating them cruelly, and in a way which was likely to produce such a disease as that of which the slave Daniel had died. It might be doubtful, if even such evidence as this would be admissible; but that which was offered, was only evidence of *general character and reputation*; in other words, *hearsay*, and was plainly inadmissible.

[5.] The fifth and sixth assignments of error will be considered together. They grow out of the charge of the Court, when, among other things, instructed the Jury, "that on the question

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soundness, if they should believe that the seeds of the disease were in the negro, at the time of sale, though not developed till sometime after the sale, but afterwards died of this same disease, which was upon him at the time of the sale, this would constitute a breach of the warranty of soundness".

The defendant's Counsel insisted, in the argument before the jury, "that in this case, the plaintiff was bound to prove, positively, that the negro was of no value at the time of sale, or could recover nothing; and that keeping the negro and failing to return him, or offering to return, was evidence of some value; and after the argument, the defendant's Counsel requested the Court to charge the Jury, that the burden of proof was on the plaintiff; and that unless the plaintiff had proven that the negro boy, at the time of sale, was of no value, they must find for the defendant". And the Court charged the Jury, that "in this case, they must be satisfied, from the evidence, that the negro was of no value, at the time of sale, or they must find for the defendant".

To all of this the Counsel excepted.

Now the first part of this charge, by itself, would have been objectionable. If the evidence had shown, that at the time of purchase, although the seeds of the disease were in the negro; yet, that by proper treatment, he might have been restored to health, and was, accordingly, worth something—*anything*—then the plaintiff in error was entitled to be allowed something for him in the Court below. And if the Court had added nothing to the sentence first quoted, perhaps the objection which is taken would have been fatal. It was proper for the Jury to decide, from the testimony of Dr. Ridley, or from any other evidence, whether or not the slave might not have been cured, if he had received judicious treatment from the time of the sale; and if they believed that he might have been restored, then was he, at that time, worth something. If worth nothing, and there was no proof of an offer to return the negro, and no evidence of *what* that something was; that is to say, no proof of *amount*, in such case there would have been nothing on which a verdict for the plaintiff could rest; and the

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defendant would have been entitled to the verdict. In such event, if the Judge had not added anything to the first sentence of instruction quoted, he would have failed to place the matter in its proper light before the Jury. But, as we have seen, the Court distinctly told the Jury, that in that case, they must be satisfied, from the evidence, that the negro was of no value, at the time of the sale, or they must find for the defendant. This surely brought their attention to the fact, that if there was before them any proof that the negro was of some value, under the circumstances in evidence, they must find for the defendant; and it sufficiently qualified what he had said, as to the seeds of the disease being in the slave at the time of the sale. This was recognizing, too, what the Counsel had insisted on in the argument, viz: that "the plaintiff was bound to prove that the negro was of no value, at the time of sale, or he could recover nothing".

Whether or not the keeping of the negro, and failing to tender him back, was evidence of some value, was for the Jury to decide. Certainly, under the instructions given, if they had found this to be so, they would have been compelled to find for the defendant. We cannot see, therefore, how that defendant has suffered injury from the charge; and we accordingly affirm the judgment.

No. 37.—THOMAS POLLOCK, administrator, &c. plaintiff in error; vs. WM. P. GILBERT, executor of William Smith, et al. defendants in error.

[1.] The rule is stern and inflexible, that a party cannot ask for relief in Equity, on the ground that he has failed or omitted to make a legal defence at Law, even where the judgment at Law is manifestly wrong, unless he was prevented from doing so by fraud or accident, unaided with any fraud or negligence in himself or his agents.

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k.] Where the complainant has been sued at Law, and has a legal defence, and only needs the aid of Equity to make it available, by getting discovery to establish his defence, he must go into Equity for discovery, before the trial at Law.

k.] That matters which have received a judicial determination, cannot be called again into controversy, applies, with full force, not only in the same forum, but also as between Courts of Law and Equity.

l.] When the jurisdiction of a Court of Law has once attached to a cause, its decision is final, as to all matters within its cognizance; and operates as a bar to their subsequent litigation, in the same or any other tribunal.

l.] No degree of wrong or injustice, in the determination of a case at Law, will entitle the injured party to resort to Equity, unless there is some special ground for its interposition.

l.] But when a cause involves matter exclusively within the jurisdiction of Equity, its final decision at Law, will not preclude a re-examination in Chancery.

l.] The existence of an equitable defence, which could not have been made available as a legal defence, is a sufficient ground for obtaining an injunction to restrain a Common Law proceeding, before or after judgment.

l.] Equity will interfere by injunction, either before or after judgment, whenever the cause is shown to involve matter purely of equitable cognizance, and essential to its proper determination.

l.] The general principle, with regard to injunctions, after judgment at Law, is this: that any fact which proves it to be against conscience to execute such judgment, and of which the party could not have availed himself in a Court of Law, will authorize a Court of Equity to interfere, by injunction, to restrain the adverse party from availing himself of such judgment. A Court of Equity will interfere, at any stage of the suit at Law, upon a proper case being presented. An injunction is sometimes granted to stay trial; sometimes, after verdict, to stay judgment; sometimes, after judgment, to stay execution; sometimes, after execution, to stay the money in the hands of the Sheriff, if it be a case of a *fieri facias*; or, to stay the delivery of possession, if it be a writ of possession.

In Equity, in Houston Superior Court. Demurrer. Decision made by Judge HARDEMAN, May Term, 1854.

This bill was filed by Wm. P. Gilbert, executor of Wm. Smith, deceased, George Walker and George W. Jourdan, against Thomas Pollock, administrator of Biedon Smith, deceased.

The bill alleges, that in 1847, while sick and in contemplation of his death, Wm. Smith executed a deed of gift to his



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son, Risdon Smith, for lots of land numbers 102, 103 and 121, in the 11th district of Houston County; that after the execution of this and other instruments of like character to other children, the said Smith declared his intention to be, not to deliver said instruments to the parties for whom they were intended, but directed them to be folded up and handed to his said son, Risdon Smith, to be kept by him until the said Wm. Smith should call for them; that the said lots of land constituted the homestead upon which the said Wm. Smith resided, and Risdon was the only child living with him. That in 1848, after he had partially recovered from his affliction, the said William Smith became dissatisfied with the disposition he had made of said lots of land, and entered into an agreement with the said Risdon to purchase back from him all his interest in and to the same, which agreement was as follows: the said William agreed to convey and did convey to the said Risdon, two negroes, Jim and Dick, worth \$1,500, and a wagon and six mules, and other property, worth some \$1,500, in consideration of which the said Risdon agreed to relinquish and release all claim to said lands to the said Wm. Smith, but never executed said deed of release and relinquishment.

That the deeds of gift were not recorded, and the parties thereto were informed and believed, that it would be sufficient to cancel or destroy them; and the title to the property conveyed by them, would return to and revert in William Smith, without a conveyance from the said Risdon; and that the deeds were handed back to the said Wm. Smith by the said Risdon, to be cancelled and destroyed; that Wm. Smith died in 185— and left Gilbert his executor. The bill further states, that after said agreement, the said Risdon always disclaimed title to the said lands; that the said William continued to reside on said lands, and to cultivate a portion of the same, until the year 1850, when he removed to the State of Louisiana; that on the 5th day of April, 1850, complainant, George Walker, bought said lands from the said William Smith, and received from him a deed of conveyance thereto; that Risdon Smith died intestate in the year 1849, and Thomas Pollock

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ingested on his estate, and commenced his action of ejectment, as such administrator, against complainants, George Walker and George W. Jourdan, (who had been put in possession of said lands,) for the recovery of the same, returnable to April Term, 1851, of the Superior Court of Houston county. That Wm. Smith, then in life, was notified to defend said cause as by his covenant of warranty he was bound to do; that said cause was tried on the appeal at the April Term, 1853, of said Court, and a verdict rendered in favor of Pollock, the plaintiff, as administrator of Risdon Smith, upon which judgment was entered up for the said premises, and the sum of One Thousand Dollars for *mesne* profits, rents, &c.

The bill further charges, that said recovery was had by the Pollock, as administrator, by setting up title under the deed of gift, the contents of which were proved by parol; complainants, Walker and Jourdan, relied upon the cancellation of said deed of gift, under and by virtue of the agreement between the said William and Risdon Smith. The bill charges, Risdon Smith, in his life-time, and since his death the Pollock, holds the legal title to said lands, in trust for the complainants.

The bill prays that the said Pollock, adm'r, &c. may be enjoined from enforcing the judgment in the said action of ejectment; be declared trustee, &c.; and be decreed to execute a bill of release and relinquishment to complainant, Walker, to said land, &c.

To this bill the defendant filed a general demurrer, which the Court over-ruled and ordered the defendant to answer. To this decision and ruling, Counsel for defendant, excepted.

ALL, WARREN & SCARBOROUGH, for plaintiff in error.

ILES, BAILEY & POE, for defendant in error.

by the Court.—LUMPKIN, J. delivering the opinion.

The only question in this case is, will a Court of Chancery
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interfere, to grant relief against the judgment at Law, under the facts set forth in the bill?

None of the cases cited, either from our own reports, or from the decisions of other Courts, are exactly in point. All of them relate to *legal* defences, which might have been made available in a Court of law; whereas, the ground of resistance to the recovery at Law here is, a pure equity which could not have been set up at Law. And for not arresting the action of ejectment, before judgment and filing a bill for the establishment of the defendant's title, to-wit: a deed from Risdon to William Smith, it is insisted that the complainant comes too late, now, to get an injunction against the ejectment, until a decree can be had.

[1.] We do not intend to disturb the rule, that a party cannot ask for relief in Equity, on the ground that he has failed or omitted to make a legal defence at law. This rule is stern and inflexible, even where the judgment at Law is manifestly wrong in law and in fact.

[2.] And such have been the uniform decisions of this Court. And we now go further, and say that where the complainant has been sued at Law and had a legal defence, and only needed the aid of Equity to make it available, by getting discovery to establish his defence, he must go into Equity for discovery, before the trial at Law.

[3.] And further, we hold that the rule, that matters which have received a Judicial determination, cannot be called again into controversy, applies with full force, not only in the same jurisdiction, but also as between Courts of Law and Equity.

[4.] When the jurisdiction of a Court of Law has once attached to a cause, its decision is final, as to all matters *within its cognizance*; and operates as a bar to their subsequent litigation, in the same or any other tribunal.

[5.] Hence, no degree of wrong or injustice in the determination of a case at Law will entitle the injured party to resort to Equity, unless there is some special ground for its interposition.

[6.] But when a cause involves matter exclusively within the

jurisdiction of Equity, its final decision at Law will not preclude a re-examination in Chancery. Under such circumstances, the doctrine of *res adjudicata* does not apply. For as the matter on which the intervention of Equity is asked, could not have been determined at Law, it cannot be within the contemplation of the legal decision.

[7.] The existence of an equitable defence, which could not have been made available as a legal defence, is therefore a sufficient ground for obtaining an injunction, before or after judgment. (2 *White & Tudor's Leading Equity Cases*, 96.)

And after reciting the cases of *Foster vs. Wood*, (6 Johns. Ch. R. 89); and the *Marine Insurance Company of Alexandria vs. Hodgson* (7 Cranch 382); and *Truly vs. Wanger, et al.* (5 Howard, 141), these annotators continue—

[8.] "It is well settled, in accordance with the rule laid down in these cases, that Equity will interfere by injunction, either before or after judgment, whenever the cause is shown to involve matter purely of equitable cognizance, and essential to its proper determination." (*Ibid*, 97.)

Upon a proper case being made, a Court of Equity will interfere to arrest the proceeding at Law, at any stage of it. Thus, an injunction is sometimes granted to stay trial; sometimes, after verdict, to stay judgment; sometimes, after judgment, to stay execution; sometimes, after execution, to stay the money in the hands of the Sheriff, if it be a case of a *fieri facias*; or to stay the delivery of possession, if it be a writ of possession. (3 *Wooddes' Lectures*, 56, pp. 406, 407, 412, 426. 1 *Mad. Ch. Pr.* 109, 110. *Eden on Injunctions*, ch. 11, p. 44.)

This is so complete an epitome of the whole doctrine upon this subject, as deducible from the opinions of Chancellor Kent, in the case in 6th Johnson, and of Chief Justice Marshall, in 7th Cranch, and of Mr. Justice Grier, in 5th Howard, as well as the general current of authorities, that we consider it useless to extend the discussion. See, further, 5 *Johns. Ch. R.* 122; 1 *S. & M. Ch. R.* 524; 13 *Ala.* 198, 798; 7 *Porter*, 549; 8 *S. & M.* 131; 4 *Iredell's Eq.* 97; 4 *Johns. Ch. R.*

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188; 17 *Johns.* 384; 5 *Ga.* 22; 6 *Grattan*, 352; 3 *English*, 287; 4 *Iredell's Eq.* 183; 15 *Ala.* 501; 5 *Grattan*, 645; *Power vs. Reeder*, 9 *Dana*, 6.

The relief prayed for by this bill, is a decree for a deed to be executed by the administrator of Risdon Smith, to the vendee of William Smith. The defence is not only purely equitable, but one which could not, by possibility, have been made available as a legal defence. Was the defendant, then, in ejectment, bound to arrest the proceeding at Law, *before trial*; and failing to do so, does he come too late to obtain the intervention of a Court of Equity, *after judgment*? The cases say not; and we know of no such rule as that sought to be established by the Counsel of Pollock.

The only case which he adduces in support of his position, is the *over-ruled* opinion of Vice Chancellor *Whitlsey*, in *Paterson vs. Bangs*, (9 *Paige*, 627.)

In the first place, I would remark, that the only question before the Vice Chancellor, there, was whether a complainant, who was sued at Law, and has a legal defence to such suit, and who only needs the aid of a Court of Chancery to obtain a discovery, to enable him to establish such defence, must come into the Court of Chancery for his discovery, *before the trial at Law*? And as a general rule, the Vice Chancellor held, and we think, as a question of diligence, very properly, that he was.

But waiving this criticism, it will be seen that the opinion of the Vice Chancellor is qualified by this important idea: the complainant *must know* that his defence is not available at Law, and that he can only succeed, in a Court of Equity, upon a bill for relief, and neglects to file such bill, in order that such negligence will be imputable, as will exclude the party from equitable relief.

In the case before us, it is evident that the complainant was ignorant that his defence could not be made available at Law. He believed, and did not doubt the fact, until he had the judgment of this Court to the contrary, that the cancellation or destruction of the unrecorded deed from William Smith, the fa-

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then, to Risdon Smith, the son, would re-vest the title in the grantee; or rather, that it would annihilate the only legal evidence, that it had ever passed out of him. And this rebuts the idea of want of diligence. He did not know that he could have aid, only by bill of relief, until after the trial at Law.

But it is insisted that the plaintiff in ejectment having prevailed at Law, that he should be allowed the benefit of his judgment; and that his writ of possession should not be stayed, which is *fructus finis et effectus legis*; especially, as the defendant can renew the suit, to recover the land and file his bill in aid of his Common Law action.

[9.] But, say the Supreme Court, in *Trusty vs. Wanger et al.* adopting the same language before held by them in the *Marine Insurance Company vs. Hodgson*, (7 Cranch: 332;) and also in *Jarvis vs. Chandler*, (1 Turn. & Russ. 319,) "the general principle, with regard to injunctions, after a judgment at Law, is this: that any fact which proves it to be against conscience to execute such judgment, and of which the party could not have availed himself in a Court of Law, or of which he might have availed himself at Law, but was prevented by fraud or accident, unmixed with any fraud or negligence, in himself or his agents, will authorize a Court of Equity to interfere, by injunction, to restrain the adverse party from availing himself of such judgment".

Here, every fact charged in the bill, is admitted, by the demurrer, to be true. It is admitted that the original deed of gift to the defendant, from his father, was made in contemplation of death; that William Smith having partially recovered, entered into an agreement with his son to re-purchase the land, and paid him therefor a full consideration. That the first deed never having been recovered, the parties were advised that a recognizance was unnecessary; and that the destruction of the instrument would re-vest the title in the donor; and that accordingly, the deed of gift was destroyed; that bills of sale were executed and delivered, by William to Risdon Smith, for the property which was given in exchange for the land, which was taken possession of by Risdon Smith, who left the land in

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the occupancy of his father, never pretending to set up any claim, thereafter, to the same; that William Smith continued to reside on a portion of the premises, until he removed to the State of Louisiana; and that some two years after, the last transaction between himself and his son, he sold the land to George Walker.

I ask, with such admissions as these, would it not be against conscience to allow this judgment at Law to be enforced? To oust the defendants of their possession, and to put them to the expense and inconvenience of re-commencing, *de novo*, the litigation at Law? And moreover, with such admissions, on the part of Pollock, the administrator of Risdon Smith, does it lie in his mouth to object, that due diligence has not been used, on the part of the defendants, in asserting their title?

He had better answer the bill. It is sur-charged—over-loaded—with equity.

No. 38.—WILLIAM B. POYTHRESS, plaintiff in error, vs. RUSSELL K. POYTHRESS, defendant in error.

[1.] Where, pending a proceeding in Chancery for the removal of a testamentary trustee, application is made for the appointment of a receiver, a subsequent case must be made by the complainant before the Court will interfere.

[2.] It is not enough to allege that the habits of the trustee are bad, and that his conduct toward his *cestui que trust* is capricious. It must appear that there is good reason to fear that the trust property will not be forthcoming, to answer the decree in the premises, at the end of the litigation.

In Equity in Troup Superior Court. Motion to appoint receiver. Decided by Judge WARNER, at Chambers, June 3d, 1854.

In April, 1854, Joseph Poythress of Troup County departed

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this life, possessed of a large estate, leaving a will, and thereby appointing the defendant in error his executor, who qualified, and proceeded to execute the said will. Item 4th of said will is, in part, as follows: "That portion of property falling to my son William, is to be received and managed by his brother, Russell K. Poythress, as trustee for William."

The bill charged, "that the executor, Russell K. Poythress, had proceeded to distribute said estate among the legatees, under the will; that he had taken possession and control of the legacy bequeathed to complainant; that he denies to complainant the right of disposing of the same, and refuses to permit him to invest it in any manner whatever; that he refuses to complainant both the profits and the possession of the estate, although there is no duty to perform which requires that said Russell K. should retain the possession of the same; that he refuses to account with complainant concerning either the profits or the increase, but appropriates the same to his own use.

The bill further charges, that complainant believes and fears that his estate is in danger of being wasted, if it longer remain in possession of the said Russell K. as executor, trustee or any other capacity; that he, the said Russell K. is a man of the most unreasonable whims and caprices—of litigious disposition—instead of avoiding law-suits, disregards them and often makes threats and expresses a willingness to spend money in that way; and that his nature and habits are both such as to render his possession of property very unsafe.

The bill further charges, by amendment, "that the said Russell K. is in the daily habit of gaming and playing and betting at billiards, pool and other games, and visits retail groceries and gaming resorts, night and day, and loses a great deal of money in that way; that he is engaged in no profession or lawful avocation of industry; that he threatens and boasts that he intends to hold on to the property, to spite the family, and especially their mother, who, he conceives, is willing that the property should be taken out of his hands; that a portion of said estate has already been used in the games and litigation

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aforesaid, and that if the same shall be permitted to remain in the hands of the said Russell K. it will be squandered. That complainant is physically disabled, and would, in that event, have no means of support; that the said Russell has threatened to give notice that complainant shall not be credited and that he shall not be permitted to purchase such things as he really needs and deserves to have.

The bill further states, that a part of his estate consists of family negroes, and that he is desirous of settling them on a plantation, where he can superintend them in person; that he wishes to engage in an agricultural life—the same being suitable to his interest and feelings, but that the said Russell K. refuses to permit complainant to have any control or gratify any wish in relation to the possession or profits of the property; that the said trust is no longer executory; the only duty left for the said trustee to perform, being to convey the legal title to complainant.

The bill prayed that the said Russell K. be decreed to account with and pay over to complainant his legacy, under the will, being one-fourth part of the estate of the said Joseph Poythress; and in the meantime, the Court appoint a receiver to take charge of said estate, subject to the order of said Court."

In answer to a rule *ni si*, the defendant showed, for cause why said rule should not be made absolute, and a receiver appointed pursuant to the prayer of the bill—

1st. Because complainant has not showed, upon the face of his bill, any ground for the appointment of a receiver.

2d. Because he does not show any specific acts of mismanagement or of danger to the estate in future, as call for the exercise of this power of Chancery jurisdiction.

3d. Because such appointment rests in the sound discretion of the Court, which this defendant insists cannot be judiciously exercised, without permitting the defendant to answer complainant's bill, as far as respects the facts alleged as a reason for such appointment, or some additional evidence to complainant's affidavit to the truth of such facts be submitted by complainant.

4th. Because the trust reposed in this defendant is special, continuing and executory, and this defendant insists that he might not be compelled to relinquish the same summarily and unheard, unless upon a case of palpable necessity, which case is not made by the bill of complainant.

5th. Because the bill seeks to abolish and annul an executory trust, complainant having the equitable interest only—or, if not to destroy the legal estate, at least to leave it without representation, and thereby to defeat the intention of the testator."

After argument had on the rule and answer, the Court discharged the rule, and refused to appoint a receiver, and Counsel for complainant excepted.

B. H. HILL, for plaintiff in error.

E. Y. HILL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The only question in this case is, not whether another trustee should be substituted in the place of the one designated by the will, but whether, from the case made by the bill, a receiver should be appointed *ad interim*?

The only ground upon which this could be done, is, that the trust estate is likely to be wasted before the termination of the litigation; so that ultimate injury will accrue to the complainant. He, himself, does not, and we apprehend would not, swear that he fears any such result.

[2.] Whether or not Russell K. Poythress is a suitable person to execute the trust devolved upon him by the will of his deceased father, has nothing to do with the interlocutory issue, respecting the appointment of a receiver. The habits of the trustee—his treatment of the *cestui que trust*, will all be proper matters of inquiry and proof, upon the final trial of the bill. [repeat, the only question now is, is the trust fund likely to

be squandered, during the short time that may intervene before the hearing, so as not to be accessible, to answer the decree which may be rendered in the premises? Considering the personal responsibility of the trustee, is such a result likely to occur?

It is not alleged that he has gambled off any negro or note belonging to William B. Poythress, *nor even one of his own*. And the Court below adjudged, that the fact that the defendant played cards and billiards, and frequented the grog-shops, was not, of itself, sufficient to justify the exercise of the extraordinary power invoked on this occasion. And however reprehensible such habits and practices may be, we cannot say that this was such a flagrant abuse of the Judge's discretion, as to demand the intervention of this Court.

No. 89.—ROBERT COLLINS, plaintiff in error, vs. WINSTON LESTER, defendants in error.

[1.] The principal is plain and familiar, that all oral negotiations, conversations and agreements between the parties to a written contract, and in relation thereto, which precede or accompany the execution of the instrument, must be treated as merged in it. But where there is strong presumptive evidence, that subsequently to the execution of a written contract, the parties agreed, orally, upon a new contract, which was a modification of the former, testimony may be received of negotiations and conversations between these parties, previous to the written contract, for the purpose of throwing light upon, and showing more clearly, the nature and character of the subsequent agreement.

[2.] Nothing is better settled, than that the case of an agent falls within a class which forms one of the special exceptions to the general rule, that a witness, interested in the subject of the suit, is not competent to testify on the side of his interest. And this exception extends, in principle, to every species of agency or intervention by which business is transacted; unless the case is overborne by some other rule.

Case in Bibb Superior Court. Tried before Judge STARK, May Term, 1854.

This was an action on the case, brought by the defendant in error, against the plaintiff, for the recovery of the value of a negro slave named Tom.

On the trial, plaintiff offered in evidence the testimony of Robert B. Lester, taken by interrogatories, in substance, as follows: "That in the year 1852, at the request of defendant, he hired for defendant, two of the negroes, Isaac and Robin, belonging to the estate of Benjamin L. Lester, of Baldwin County; and before they were delivered to defendant, he exchanged one of them with the plaintiff, for a boy named Tom, who, she said, was hard to manage. When witness delivered the two boys, Robin and Tom, to the defendant, he expressed himself satisfied with the arrangement. Witness delivered the negroes to defendant, in Macon, in January, 1852, with the distinct understanding that the negroes were to work, either on the South-western Rail-road or Muscogee Rail-road. In August or September, 1852, defendant informed witness that the grading on the Muscogee road was completed; and asked witness to consent that he might take Tom to Brunswick; witness refused to give his consent. Defendant then said that he would put him to work on the South-western Road. In a few days, defendant told witness that Tom had gone with the overseer and hands to Brunswick; and in a few days after they arrived at Brunswick, Tom was taken sick and died. Plaintiff's consent for Tom to go to Brunswick was never asked, save through witness, and he refused, knowing that she would be unwilling for him to go. There was a statement, in writing, that the defendant had hired these two boys, Robin and Tom—the price at which he had hired them—the number of suits of clothes the defendant was to furnish them, and the time the hire was to be paid; and that he hired them from me".

Counsel for defendant objected to the testimony, and read to the Court another set of interrogatories and answers, for the

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same witness, taken by the defendant, in substance, as follows: "I have looked upon the instrument attached to the interrogatories, to wit:"

"MACON, JANUARY 2d, 1852.

We acknowledge to have hired from Robert B. Lester, two negro fellows, Tom and Robin, and we promise to pay for Tom one hundred and twenty-five dollars, and for Robin, one hundred and fifty dollars; time of hire to expire on the 24th December next; and we promise to furnish said negroes the usual food and clothing, and to pay Doctor's bills, in ordinary sickness—said hire to be paid quarterly.

"ROBERT COLLINS".

It is so much of the contract of hiring, as was reduced to writing; but does not contain that part relating to how and where the boys were to be employed. The instrument was not drafted at the time of the hiring, for the hiring occurred in December, 1851, and the instrument was drafted in January, 1852. There was no other written contract".

The Court over-ruled the objection, and allowed the answers to the first set of interrogatories, to be read to the Jury; and Counsel for defendant excepted.

Plaintiff then proved by Robert A. Smith, that Brunswick was not on the South-western or Muscogee Road, but was at a distance from both roads, in Glynn County, some two or three hundred miles, and closed.

The defendant then read in evidence the interrogatories and answers, taken out by him, for Robert B. Lester, and the instrument thereto attached.

The Court charged the Jury, "that if they believed, from the evidence, that there was a contract between plaintiff, or her agent, and defendant, that said negro Tom should work during the year 1852, on the South-western or on the Muscogee Rail-road only, and that defendant carried the negro Tom, without the consent of the plaintiff, to Brunswick, where said negro died, then they should find for the plaintiff".

which charge, Counsel for defendant excepted; and upon exceptions has assigned error.

LE and SMITH, for plaintiff in error.

WEBB & HILL, for defendant in error.

the Court.—STARNES, J. delivering the opinion.

] The question first to be considered, relates to the admission in evidence, of the oral understanding stated by the witness Robert B. Lester, to have been made with him as agent for defendant in error.

The principle is plain and familiar, that all oral negotiations, discussions and agreements between the parties to a written act, in relation to the subject matter thereof, which precede or accompany the instrument, must be treated as merged in the latter and the latter is to be received as the sole evidence of what was agreed upon or contracted by the parties.

It is our opinion, however, that this principle did not operate to exclude the oral agreement testified to by Lester, notwithstanding the subsequent execution of the instrument which was in evidence. The date of that instrument was the 2d day of May, 1852; and the witness proves that sometime in August or September following, the plaintiff in error informed the witness, that the grading on the Muscogee Rail-road was finished, and asked his consent, as agent for the defendant in error, that he should be allowed to take the slave Tom to Brunswick; which request was refused. He also swears, that the plaintiff in error then said, that he would put Tom to work on the track of the South-western Rail-road, and that in a few days thereafter, he came to the witness and told him that he had not sent the slave to work on the said road; but that he had gone off with the overseer and hands to Brunswick. At that place, the witness represents the plaintiff in error, saying, that the overseer had carried Tom with him, without his consent.

If we analyze this evidence, we will find it showing these things: 1. That the plaintiff in error had asked the consent of the witness, as agent of the defendant in error, to the removal of Tom from the Muscogee Rail-road to Brunswick. And it seems fair to infer that he would not have asked such consent, if there had been a general contract of hiring between them, and not a contract restricting the employment of the slave, in whole or in part, to this Road. 2. That the plaintiff in error quietly acquiesced, when such consent was refused, and said he would put Tom to work on the track of the South W. Rail-road, by which, the conclusion is authorized, that the slave was not hired generally, but with reference to employment, at least in part, on the Road last mentioned. 3. That in a few days after, the plaintiff in error went to the witness, and announced that Tom had gone off with the overseer and hands to Brunswick, and said that the overseer had carried him off without his consent. Which latter fact seems to justify the inference, that there was something wrong in this removal of the slave, or the plaintiff in error would not thus have sought the witness and apologized for it, as it were; and indeed, that if he had hired the slave in a way which would have given him the right to remove him to Brunswick, he would not have withheld his consent that the overseer should remove him.

These things, all taken together, afford presumptive evidence, so strong as not to be resisted, that the parties had, at some time previous to August or September, 1852, entered into an agreement, to the effect, that the slave Tom was not to be employed by the plaintiff in error, wheresoever he might choose to take him; but that he was hired to work on the two Rail-roads specified. Such restricted agreement, however, was not in the written instrument; and by legal intendment, it could not have been made before, or at the time of the execution of that instrument, because it would have been extinguished by the latter. It must, then, have been entered into subsequently.

Regarding such subsequent contract, as being thus presumptively shown to have been orally made, this testimony of the verbal negotiations, previous to the date of the writing, was

proper for the Jury, as serving to throw light upon the nature and character of the subsequent understanding: and the same were in aid of the strong presumptive evidence which has been just detailed. Not as proving that such oral agreement was made and entered into, before or at the time of the execution of the instrument, but as serving, by a detail of preliminary negotiations, to show, more clearly, what must have been the subsequent agreement otherwise proven to have been made.

Whatever, therefore, may have been the reasons of the Court below, for the admission of this testimony, in this point of view, it went properly to the Jury.

[2.] The next and only other question presented for our consideration, by the Counsel for the plaintiff in error, was the competency of this witness to prove that he entered into the contract, as agent for the defendant in error.

Nothing is better settled, than that the cases of agents, carriers, factors, brokers, and other servants of this description, in consideration of public convenience and necessity of trade and commerce, and to prevent a failure of justice, constitute a class of special exceptions to the general rule, that a witness, interested in the subject of the suit, or in the record, is not competent to testify on the side of his interest. (*Bull. N. P.* 289. *Matthews vs. Heydon*, 2 *Esp.* 509. *Poth. on Obl. by Evans*, App. No. 16, p. 208, 267. 1 *Phil. Ev.* 140. 1 *Stark. Ev.* 118. 1 *Greenl. Sec.* 416.)

And this extends, in principle, to every species of agency or intervention by which business is transacted, unless the case is overborne by some other rule. (1 *Greenl. Ev. Sec.* 416.)

Judgment affirmed.

No. 40.—WILLIAM H. WHITE, plaintiff in error, vs. WILLIAM F. CREW, defendant in error.

- [1.] Where an illegal or fraudulent contract has been made, neither Court of Law or Equity will interpose to grant any relief to the parties, but will leave them where it finds them, if they were equally cognizant of the illegality or participated in the fraud, unless in cases where the public policy would be promoted.
- [2.] Where A was liable as indorser for B, and B executed a mortgage to indemnify him against loss, and the property is sold under the foreclosure; and B, on the day of sale, co-operates with A, to have the property knocked off to him at an undervalue, so as to enable A to save himself harmless by a re-sale: *Held*, that an agreement to that effect, and that the proceeds should be applied to the extinguishment of the original indebtedness, is neither fraudulent nor void, but binding on A; and that having taken the Sheriff's deed and gone into possession of the premises, and realized a large profit from the re-sale, Equity will compel a specific performance of the contract.
- [3.] Sales by auction are within the Statute of Frauds. Whether judicial sales are exempted from the operation of the Act? *Quere?*
- [4.] Will a Court of Equity relieve, in any case, against a mistake in pleading, or in the conduct of a cause at Law? *Quere?*
- [5.] Where the matter in which the interposition of Equity is asked, could not have been determined at Law, it is not within the estoppel of the legal decision.
- [6.] A parol contract, for the purchase and re-sale of the land of the defendant, the proceeds to be applied to the extinguishment of the judgment under which the property was sold, is not such an interest as would vest in the assignee in bankruptcy, under the Act of 1841.
- [7.] The rule in Equity, that where a replication is filed, all the allegations of the answer, which are responsive to the bill, shall be taken as true, unless disproved by two witnesses, or one witness and corroborating circumstances, explained.
- [8.] Circumstances, alone, in the absence of a positive witness, may be sufficient to over-rule the denial in the defendant's answer; and that, too, where he answers on his own knowledge.
- [9.] The rule, at most, is always subject to this modification: that "if there are circumstances sufficient to turn the scale, it ought to be turned; the oath of a by-stander, with circumstances corroborating it, being better than that of an interested person". Per Lord Chancellor *Thurlow*, in *Pember vs. Mathers*, (1 Bro. Ch. Cases, 52.)

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In Equity, in Henry Superior Court. Tried before Judge
STARK, October Term, 1853.

This bill was filed by William F. Crew, against William H. White and John Neal, for discovery, relief and injunction.

The bill states, that in April, 1840, William F. Crew, with White and others as his indorsers, executed a note to John Neal, on which Neal obtained judgment against the parties, and execution issued thereon 2d November, 1841; that Crew executed to said indorsers a mortgage upon lots of land Nos. 61, 68 and 69, in the 6th district of Henry County, which mortgage was foreclosed at the October Term, 1841, of Henry Superior Court, on which judgment of foreclosure *p. fi. fa.* was issued and levied upon the lands, and the same exposed to sale; that Crew being in debt, and willing to save his said indorsers harmless, it was agreed between Crew and White, that notice should be given the by-standers and bidders, that the object of the sale was to perfect titles and save the indorsers from loss; and that Wade H. Turner should bid off the lands for a nominal sum of money, and then turn over said bid for White's benefit, who was then to sell the lands at private sale, and apply the proceeds of said sale to the payment of Neal's claim.

That by virtue of this agreement, the land was put up and sold, and knocked off to the said Turner for \$102 50, and titles made to White by the Sheriff; that the land was then worth \$1500, and would have sold for that sum, but for the agreement, that Crew and his friends were not to bid for it, and White was to take titles to it and sell it for the benefit of Crew.

The bill further states; that in August, 1842, White sold lots Nos. 65 and 69, for \$800; and in January, 1845, sold lot No. 61, for the sum of \$250.

That in 1842 Crew owned lot No. 56, in said district, and being anxious to pay off the Neal claim, and to indemnify White, who was the only solvent indorser, at that time, consented that said lot should be sold, under a *fi. fa.* outstanding.

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against Crew, as indorser for E. F. Knot; in favor of Havland, Risley & Co.; that it was agreed that White should bid off the land, and that it should be publicly proclaimed, on the day of sale, that it was sold to perfect titles to White; and it was further agreed; that White should sell said lot privately, and allow Crew the full amount of such sale, to be credited on Neal's *f. fa.* if Crew would allow the land to be sold at a mere nominal sum; and White, accordingly, bid off the same at \$25, and subsequently sold it for \$800, on a credit, to James J. Mitchell, who paid him \$75, and failing to pay the balance; White filed a deed and had the land re-sold for \$400; which sums, together with the proceeds of the mortgaged lands, should have been applied to the payment of the Neal *f. fa.*—as also \$150, the rent of the lands while in White's possession, and which, it was agreed, should thus be applied.

The bill charges that the Neal *f. fa.* has been thus paid off and discharged by Crew, and that White is controlling said *f. fa.* and fraudulently combining with Neal, to vex and harass complainant, and has ordered the *f. fa.* to be levied upon complainant's property.

The bill prayed that said defendants be perpetually enjoined from proceeding with said *f. fa.*; and that White be decreed to account with and to complainant, for the value of said lands, and to perform, specifically, the contract and agreement in relation thereto.

In his answer, White denies all the statements made in the bill; pleaded the Statute of Frauds and Perjuries, and demurred to the bill for want of equity.

The defendant, Neal, denied all the charges and allegations in the bill, so far as the same applied to him; and upon the coming in of his answer, the injunction was dissolved, as to him; and the *f. fa.* allowed to proceed.

On the trial of the cause between complainant and the defendant, White, at October Term, 1854, of Henry Superior Court, after the bill was read to the Court and Jury, Counsel for defendant moved to dismiss the bill—

1st. Because there was no equity in the bill, . . .

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2d. Because the contract or agreement therein set forth, is for the fraudulent purpose of evading the payment of crew's debts, other than the Neal claim; and was therefore *id.*

3d. Because the said contract not being in writing, was obnoxious to the Statute of Frauds and Perjuries.

Which motion the Court over-ruled, and Counsel for defendant excepted.

Wm. H. Turner, sworn by complainant, testified, "that the ads were knocked off to him, at the price of \$102-50--turned over to Wm. H. White. I held *ad. fas.* and wanted my money. White told me there was plenty of property pay my *ad. fas.* and wanted me to let them alone, as it was the best they could do--turned over the lands to White, for crew's benefit, as I thought; if I had not thought so, I would have held on to the land. Neither Crew nor White applied to me to bid for the lands before the sale." To the introduction of this testimony, defendant objected. The Court over-ruled the objection and defendant excepted.

Wm. Markham, sworn: White told witness, after the sale, that there was an understanding between Crew and himself, that he intended to sell the lands for Crew's benefit.

Isaac Jackson, sworn: "White told witness, after he had sold the lands, that he had sold them for \$200 more than he needed as security for Crew, which would pay him for his trouble; that he did not charge Crew anything, but intended to give the \$200 to Crew or his family".

The Neal *ad. fas.* was then read in evidence; also all the deeds made to White.

Defendant then offered to read in evidence an affidavit of illegality, filed by Crew; to said *ad. fas.* before the filing of said bill; to show that the defence to the *ad. fas.* set up in the bill, as embodied in the affidavit, and that said affidavit of illegality had been dismissed. Also, offered in evidence Crew's certificate in bankruptcy, dated the 12th January, 1843, to show that Crew could not recover against White a demand which existed in the assignee in bankruptcy.

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The Court rejected both the certificate and the affidavit of illegality, and Counsel for defendant excepted.

The Court charged the Jury, that the execution of the deeds to the land by the Sheriff, to White, was a part performance of the contract, on the part of Crew, and took the case out of the Statute of Frauds and Perjuries; that where the answers of the defendant were responsive to the charges of the bill and denied those charges, the complainant was bound to over-rule the answers; by the evidence of one witness and corroborating circumstances.

To this charge of the Court, Counsel for defendant excepted, and on these several exceptions error is assigned.

MOORE & EZZARD, for plaintiff in error.

DOYAL & SPEER, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion:

[1.] In the judgment of this Court, the defendant, White, has totally misapprehended the nature of the agreement entered into between the complainant and himself. We recognize the general rule, that where an illegal or fraudulent contract has been made, neither Courts of Law nor Equity will interpose to grant any relief to the parties, but will leave them where it finds them, if they were equally cognizant of the illegality or participated in the fraud, unless in cases where the public policy would be promoted.

[2.] But such is not the character of the contract charged in this bill. *English vs. Tomlinson et al.* (8 Humphrey's R. 378.) For aught that appears to the contrary, it was entered into for the very laudable purpose of enabling White and the other indorsers of Crew on the Neal debt, to indemnify themselves against loss on account of their liability on that debt. And in this sense alone, and in no other, can it be said to have been made for the benefit of the complainant.

[3.] In opposition to the specific performance prayed for by this bill, the Statute of Frauds is insisted on.

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That sales by auction are within the Statute, is not now an open question. *Blagden vs. Braglear* (12 Ves. 450;) *Kenneth vs. Schofield* (2 Barn. & Cress. 947.) *Walker vs. Constable* (1 Bos. & Pul. 306.) *Emmerson vs. Hodis* (2 Talmt. 38.) *White vs. Proctor* (4 Talmt. 200.) *Hinde vs. Whitehouse* (7 East. 558.) But in the case of the *Attorney General vs. Day* (1 Ves. 219), while Lord *Murdock* admitted that sales by auction were not excepted, he distinguished judicial sales from other sales by auction, holding that the former were necessarily exempted from the operation of the Statute. Without extending the inquiry further, as to whether or not the policy of the Statute applies to all public as well as private sales, we hold, that under the facts of this case, it would be a gross fraud not to compel the defendant to execute his part of the agreement. To save him harmless, such proclamations were made on the day of sale as greatly to depress the market price of the property, by keeping off bidders. The land was cried off and turned over to him. He took the Sheriff's debt—here sold it, according to the understanding between complainant and himself, at a large profit, and now refuses to execute his part of the agreement, to apply the proceeds to the extinguishment of the Neal debt. We repeat, it would be a fraud upon Crew, and flagrantly inequitable to suffer his refusal to work such a prejudice. See *Dani's Vendors and Purchasers of Real Estate*, note 1, p. 477.

And the Court was right in not allowing the affidavit of illegality, interposed by Crew against the Neal *fa. fa.* Before this bill was filed, to be read in evidence. The object of this testimony was to show that the question made by the bill was *res adjudicata*.

[4.] It is not necessary to question the doctrine that a Court of Equity will not relieve against a mistake in pleading, or in the conduct of a cause at Law. There is, however, respectable authority to be found, in support of the affirmative of this proposition. (*Anonymous*, 1 Vernon, 119, and cases cited in the note, 1st American Edition. *Wesley vs. Thomas*, 6 Harr. & Johns. 24. *Lanmat vs. Bowley*, Id. 500. *Price vs. Fu-*

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qua, 4 *Munt.* 68. See *Waterman's Eden on Injunctions*, 3d Edition, p. 21, note.)

[5.] The matter on which the intervention of Equity is here asked, could not have been determined at Law; and consequently, it cannot be within the estoppel of the legal decision. Perhaps it was for this very reason, that the affidavit of illegality was abandoned by the defendant, Crew; or was dismissed by the Court. There was, in fact, no judgment at Law, as to the grounds for relief prayed for in this bill.

[6.] We confess that we are unable to comprehend, very clearly, the object in offering in evidence the certificate in bankruptcy, which was obtained by Crew the 12th of January, 1848. The bill of exceptions states that it was to show that Crew could not recover, against White, a demand which vested in the assignee in bankruptcy. But it does not appear that the claim was upon the debtor's schedule. But whether it was or was not, he does not seek to enforce a moneyed demand against White; but the performance of a duty or obligation, namely: to compel him, in pursuance of his undertaking, to apply the fund arising from the re-sale of the land, which he bought and held on trust, for the benefit of Crew, to the extinguishment of the Neal judgment.

[7.] The charge of the Court is excepted to. The only thing in it, not already noticed, is the concluding clause: that the complainant was bound to overcome the answer, by the evidence of one witness and corroborating circumstances.

The error assigned here is, that the Court should have instructed the Jury, that to overcome the answer of the defendant, which is responsive to the bill, that in addition to the testimony of one witness, the *circumstances* should equal, in strength, the proof of another witness. But such is not our understanding of the rule. True, from the manner in which it is usually stated in works on Equity Practice, this inference might seem to be warranted: that where a replication is put in, and the parties proceed to a hearing, all the allegations of the answer which are responsive to the bill, shall be taken as true, unless they are disproved by two witnesses, or by one wit-

ness, with corroborating circumstances; that is, with circumstances which would equal the evidence of another witness. But Mr. *Daniel* lays down the rule more guardedly. He says, that where the answer, in express terms, negatives the allegations in the bill, and the evidence of one person only, affirms what has been so negatived, then the Court will neither make a decree nor send it to a trial at Law; or, as he otherwise expresses it, unless the denial, by the answer, is contradicted by the evidence of more than one witness. (1 *Ch. Pl. & Pr.* 983.) And by reference to the numerous American cases, cited in the note by Mr. *Perkins*, the Editor, it will be found, that in many of them, very slight preponderating circumstances, in addition to the positive proof, were sufficient to turn the scale against the defendant.

[8.] Indeed, circumstances alone, independent of any direct proof, might often justify and require a decree against the answer. (*Kang vs. White*, 5 *J. J. Marshall*, 223. *Clark's Ex's. vs. Van Rien's Dyk*. 9 *Cranch*. 154.)

[9.] In *Pember and his Wife vs. Mathers*, decided in 1778, (1 *Brown's Ch. R.* 52,) Lord Chancellor *Thurlow*, in commenting on this rule, says: "It stands on great authorities—so does the manner of liquidating it. I do not see great reason in either. The rule is subject to this modification; that if there are circumstances sufficient to turn the scale, it ought to be turned. The oath of a by-stander, with circumstances corroborating it, is better than that of an interested person."

And in support of this qualification of the rule, see 1 *Greenleaf's Ev. pt. 2, ch. 14, §260*. 1 *Phil. Ev. Cowen & Hill's Edition*, 154, 155, and the numerous cases cited by Mr. *Perkins*, in note *a*; to the case of *Pember and Mathers*.

The judgment below is affirmed.

Drumright and others vs. Philpot.

No. 41.—WILLIAM DRUMRIGHT and others, plaintiffs in error,
vs. DAVID PHILPOT, defendant in error.

- [1.] A subscribes the name of a firm, of which he claims to be a member, to a contract of sale; B, the other partner, subsequently ratifies the act, by receiving the purchase-money, &c.: *Held*, that the confirmation or subsequent adoption of B being established, it is competent to give, in evidence, the declarations of A, as to the partnership, made at the time the contract was executed.
- [2.] A partner cannot, by virtue of the authority he derives from the relation of co-partnership, bind his co-partner by deed; but a prior authority, or a subsequent ratification, not under seal, either express or implied, verbal or written, is sufficient to establish the deed as the deed of the firm, and binding upon it as such.
- [3.] Where there is a complete execution of his authority by an agent, and something more is added, not warranted, the execution is good for that which is authorized, and the excess only is void.

Covenant, in Troup Superior Court. Tried before Judge WARNER, May Term, 1854.

This was an action of covenant, for a breach of warranty, in the sale of three negroes—Becky and her two children, Robert and Ellen—brought by Philpot, against William Drumright, George Nixon and John A. Gough. Drumright alone, was served, who filed the plea of “*non est factum*” to the bill of sale, the foundation of the action.

On the trial, plaintiff offered in evidence the testimony of John F. Moreland and David A. Philpot, taken by interrogatories. Moreland testified, that “he was a physician—called in May, 1850, by plaintiff, to examine Becky and her two children—thinks Becky, from appearances, had been diseased several years with scrofula—can’t be cured—does not know whether the children were unsound when he examined them—had unusual glandular swellings about their throats and necks—would not like to risk the development of scrofula, as they progress towards mature age”.

Philpot testified, “plaintiff purchased the negroes of J. A. Gough and Daniel Earp, in Heard County, on the 13th May,

50. The bill of sale attached to the interrogatories, was one executed by J. A. Gough to the plaintiff, for the negroes, Becky and her two children, and another woman and child; the purchase-money for the whole lot (\$1250) was paid but fifty dollars, for which plaintiff gave his due bill; plaintiff afterwards tendered the negroes back to defendant, but defendant, Drumright, would not receive them, but made propositions to exchange other negroes for them; this was where defendant was arrested with a bail writ. After that, witness heard defendant say that he had the money and plaintiff had the negroes, and he would have to feed them; and that he (the defendant) could make enough on the money to pay expenses".

On the introduction of this testimony, defendant objected, and the Court over-ruled the objection, and defendant excepted. Wm. A. Cook testified by interrogatories, as follows: "I inherited Becky from his father, and owned her for twenty-four years, when he sold her and her children, Ellen and Robert, to Wm. Drumright, who he understood, from both Wm. Drumright and George Nixon, bought for Drumright and Nixon as partners—received \$300 for the children, with the understanding that Drumright was to take Becky for nothing—she being diseased with scrofula; the children were sound and healthy, at that time.

Plaintiff then read in evidence the following admission of defendant, made in consequence of Alphonzo Hemphill, a witness summoned by plaintiff, being absent, and by whom plaintiff alleged he could prove the facts admitted, to-wit: "the tender of the negroes and the bill of sale back to defendant, by plaintiff, who alleged unsoundness of the negroes; that Drumright replied that they would not take them back; that he had received the money for them, and could make the expenses out of it, by the way the plaintiff could law it out",

Plaintiff then offered to prove by David A. Philpot, that at the time plaintiff purchased the negroes from Gough, that Gough represented himself as one of the firm, in negro trading,

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of Drumright, Nixon and Gough. To which defendant objected; the Court over-ruled the objection and Counsel for defendant excepted.

Plaintiff then read in evidence the bill of sale: "warranting the title of said negroes; and that they were sound and healthy, in both body and mind," which was signed—

WM. DRUMRIGHT &

GEORGE NIXON.

J. A. GOUGH.

Defendant objected. The Court over-ruled the objection, and defendant excepted.

Plaintiff then proved, "that had Becky and her two children been sound, at the time of sale, they would have been worth \$1000; that in their present proven condition, they were worth \$250, or half price".

Defendant introduced no evidence, but requested the Court to charge the Jury, "that an authority, by deed, is necessary, in order to bind the principal under seal; also that a partner, though the articles of partnership were under seal, is not empowered to bind his copartners by deed, without an authority of as high a nature". Also, "that if the principal acknowledged that he gave the agent authority to execute a deed, yet, the acknowledgment, itself, is not sufficient to prove it, without the production of an authority under seal".

All which requests the Court refused to charge, on the ground, "that a sale and warranty of the soundness of slaves, need not be evidenced in writing".

To which decisions and rulings of the Court, defendant excepted; and on these several exceptions, error is assigned.

JOHN L. STEPHENS, for plaintiff in error.

B. H. HILL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The defendant in error declared against the plaintiff, in

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the Superior Court of Troup County, for the breach of a warranty of soundness contained in a bill of sale, by which William Drumright & George Nixon, and John A. Gough, in consideration of Twelve Hundred and Fifty Dollars, transferred five negroes—Becky and her two children, Ellen and Robert, and Vina and her infant child, to the plaintiff; the right and title, as well as the soundness of the said slaves, being warranted, under the hands and seals of the parties. The bill of sale was, in fact, executed by Gough alone, in the name of the other two parties—Drumright & Nixon and himself.

William Drumright, alone, was served with process. It was proven, on the trial, that the plaintiff tendered the negroes and bill of sale back to the defendant, and demanded that the purchase-money should be refunded—alleging that three of the negroes, viz: Becky and her two children, were unsound. But Drumright refused to rescind the contract. He admitted that he had received the purchase-money. He made some offer to compromise; by exchanging other negroes, saying, that if he were to sell negroes and take them back, he should never get through with them. This took place before he was arrested. Afterwards, it was in testimony, that he said that he had the money and the plaintiff the negroes, who would have to feed them; and that he, Drumright, could make the expenses of the suit on the money, before plaintiff could law it out of him.

After this proof was introduced, as to the recognition and ratification of the contract of sale, by Drumright; the Court admitted the representations of Gough, as to the partnership in this transaction between Drumright and himself, though objected to by defendant's Counsel.

We see no error in this ruling.

[2.] But the main point in this case remains to be considered. The testimony and the argument having closed; the Court was requested, by defendant's Counsel, to charge the Jury, that an authority, by *deed*, was necessary to bind the principal, under seal; and also, that a partner, although the articles of partnership were under seal, is not empowered to

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bind his co-partners by deed, without an authority of as high a nature; and that if the principal acknowledged that he gave the agent authority to execute a deed; yet, that acknowledgment is not sufficient to prove it, without the production of a power under seal. All of which requests were refused by the Court, on the ground that a sale and warranty of soundness of slaves, need not be evidenced by deed.

It is not my present purpose to controvert the old rigid doctrine of the Common Law, which asserts that no prior authority or subsequent ratification, either verbal or by writing, without seal, is sufficient to give validity to an instrument, as the deed of the party. I yielded a reluctant assent to this threadbare technicality, in *Ingram vs. Little*, (14 Ga. R. 173). In *Texira vs. Evans*, cited in *Master vs. Miller*, (1 Anstr. 228.) Lord Mansfield repudiated the doctrine, and Chief Justice Marshall, in *Anderson vs. Tompkins*, (1 Brock. U. C. R. 462,) expressed himself dissatisfied with the extent to which it had been carried. In New York, Pennsylvania and Alabama, the authority of *Texira vs. Evans* is recognised and followed. (*Woolley vs. Constant*, 4 Johns. 54, 60. *Ex Parte Kerwin*, 8 Cowen, 118. *Stapl. vs. Berger and another*, 10 S. & R. 170. *Sigfried vs. Levan*, 6 Idem, 808. *Wiley and another vs. Moore and another*, 17 Id. 438. *Graham vs. Obyle*, 2 Penn. 132. *Boardman vs. Gore & Williams*, 1 Stewart, 517.) And from the reported cases, some of the other States, it would seem, begin to take the same view of this principle. (5 Mass. 538. 6 Id. 519. 3 Pick. 326. 3 Mete. 103. 2 Dana, 142. 4 Id. 191. 2 Ben. Monroe, 310. 2 Green, 583, 585. 4 McFar. 239. 1 H. & M. 391. 2 Wash. 164.) And from some of the later cases, even in England, some relaxation of the rule seems to be indicated, even there. (*Earl of Palmouth vs. Roberts*, 9 M. & W. 471. *Davidson vs. Cooper*, 11 M. & W. 778, 793.)

Having discharged my duty to the country, by doing what I could in *Lowe vs. Morris and another*, (18 Ga. R. 147,) to bring the modern sawl, misnamed a seal, into merited contempt, I shall content myself with what I have now said, to

dismiss this branch of the case—and proceed to inquire; is the subsequent implied, verbal ratification of Drumright, the partnership, *quoad* this transaction, at least, being established, sufficient to establish this sealed warranty as the deed of the firm, and binding upon it as such?

I would remark, that the whole reasoning on which this doctrine depends, as well as the authorities on which it is founded, are most ably and elaborately reviewed in the cases of *Cady vs. Shepherd*, (11 Pick. R. 405, 406,) and *Grover vs. Seton*, 1 Hall, 262.) In the latter case, especially, all the English as well as the American authorities, were examined at great length, by Chief Justice Jones; and it is difficult to withhold one's assent to the conclusion at which he arrives. After expressing the utter fallacy of the reason upon which the old rule rests, that one partner cannot bind his co-partner by deed—which principle he does not attempt to disturb—he asks, “can it be that this stern rule of the Common Law, which has its appropriate sphere of action, and a most salutary operation, on these relations of society, where men, not otherwise connected, are the owners of undivided property, is to be applied, in all its force, and to govern with unbending severity in the concerns of co-partners, whose intimate connection and mutual interest require such large power and ample confidence in the integrity and prudence of each other, to give to their operations efficiency, vigor and success?”

He continues—“The pressure of these considerations has induced a relaxation of the Common Law rule, to adapt it to the exigencies of commercial co-partnerships and other associations of individuals, operating with joint funds for the common benefit. The rule, itself, remains, but the restrictions it imposes are qualified by the application of other principles. The general authority of a partner, for example, derived from his relation to his co-partners, does not empower him to seal an instrument for them, so as to make it binding upon them, without their assent and against their will. An absent partner is not bound by a deed executed for him by his co-partner, without his previous authority or permission, or his subsequent

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adoption. But the previous authority or permission of one partner to another, to seal for him, or his subsequent adoption of the seal as his own, will impart efficacy to the instrument, as his deed; and that previous authority or subsequent adoption may be by parol."

It is difficult to add any thing to this able opinion. The whole of it is worthy of the most attentive perusal.

I would merely suggest, that there is no general principle better settled, both in England and in this country, than that a corporation cannot bind itself, except under its corporate seal. Indeed, this constitutes one of the very elements of the definition of a corporation. And yet, it is now universally admitted, that where the acts done are of daily necessity to the corporation, or must be done immediately—such as issuing, accepting and indorsing bills of exchange, &c. this rule is dispensed with. Would not partnerships fail of accomplishing the end of their formation, if one partner could not bind the firm by acts and contracts, beneficial to the joint concern, and within the scope of the partnership trade and business, without a prior authority or subsequent ratification, under seal, to do so? To deny to each the use of the partnership seal, for instruments requiring it, and which the exigencies of the joint concern required, would, at this day, seriously cripple and embarrass the success of mercantile business; and the tendency of Judicial decisions, is to hold that the previous authority or subsequent adoption in such cases, may be by parol. Judge Story, in his *Treatise on Partnerships*, states that the American Courts are strongly inclined to repudiate the stern rule of the Common Law, and to hold it inapplicable to the concerns of co-partners, whose intimate connection and mutual interest require such large power and ample confidence in the integrity of each other. And to maintain that it is sufficient, in all cases, where an express or an implied authority or confirmation could be justly established, not under seal, whether it be verbal, or in writing, or circumstantial. (*Page 178, §121, citing 3 Kent's Com. Lec. 63, pp. 47; 48, 4th Edition. See, also, Rawle's Smith on Contracts, 255, note.*)

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[8.] But concede that this position is untenable. It cannot be disputed that an agency, whether general or special, and whether conferred in one way or another, unless the contrary manifestly appears, is always construed to include all the usual and necessary means of executing it with effect. (2 H. Bl. 618. 5 Bingham, 442. 10 Wend. 218. 6 S. & R. 146.) And it has been held, that an agent, employed to sell a slave, may warrant him to be *sound*, unless inhibited by the terms of the authority under which he acted. *Gaines vs. McKinley*, (2 Ala. Rep. 446.) Gough, then, was clothed, by implication, with power to warrant the *soundness* of Beckey and her two children. Strike off the *seal* as being unauthorized, still, the *warranty* is good.

If the act of one partner be a good and valid act in itself, it will not be rendered the less so, if done by a specialty, provided the seal do not vary the liability. *Dukard vs. Case* (5 Watts 22). *Henessy vs. Western Bank* (6 Watts & Serg. 301). *Tapley vs. Butterfield* (1 Metcalf 515). These cases, and many others, upon the subject of the power of a partner to bind the firm, will be found classified in the note to *Livingston vs. Roosevelt* (1 Amer. Lead. Cases, 460). "Where a man", said Lord Coke, "doeth that which he is authorized to do and more, there it is good for that which is warranted, and void for the rest." (Co. Litt. 258, a.) "Where there is a complete execution of the authority", says Judge Story, "and something *et abundant* is added, which is improper, there the execution is good and the excess, only, is void". (Story on Agency, 201. Citing Com. Dig. Attorney C. 15. Paley on Agency, by Floyd, 179, and note n. 1 Livermore on Agency, ch. 5, §1, p. 98, 101, 102, edition 1818).

And under the late Statute, which entitles either party, as matter of right, to make any amendment, either in form or substance, in pleadings, the declaration could have been remodelled, so as to make it conform to the instrument, not as a deed, but a written warranty only.

In any view of the subject then, the Court was right in the

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instructions which it gave to the Jury, and our opinion is, that the judgment below be affirmed.

No. 42.—HILLIARD CRUTCHFIELD, plaintiff in error, vs. FRANCIS DANILLY, defendant.

[1.] If the seller knows of a defect in the title to a part of the thing he sells, which is material to the enjoyment of the rest, and he does not disclose the defect to the buyer—much more, if he represents to the buyer that no such defect exists, and the buyer buys, ignorant of the defect—the buyer, although he has taken a deed, may, in Equity, have a rescission of the sale.

[2.] Injunction ought not to be dissolved on the coming in of the answer, unless the answer has denied the equity of the bill.

In Equity, from Crawford Superior Court. Decided by Judge POWERS, June Term, 1854.

Motion to dissolve injunction. Francis Danilly filed his bill, setting forth, that in 1852, he had purchased of Hilliard Crutchfield a certain tract of land, containing more than 500 acres, for which he gave notes amounting to \$3600.

That Crutchfield, at the time of sale, represented to him that he had good title to the land, and that he purchased, in consequence of such representations.

That in point of fact, as to one hundred and seventy acres of the land, and including the dwelling and buildings, Crutchfield had no title: but that it had been conveyed by deed to his wife and children, by William Smith, her father. That Crutchfield, at the time of the sale, knew of this state of the title, and concealed it from complainant. That Mrs. Crutchfield was now dead, leaving minor children. That complainant was now sued by Crutchfield on the notes, given for the purchase-money, and the bill sought to enjoin those suits and to

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survived the husband. An amendment to the bill, stated that Crutchfield had consented to the making of the deed from Smith to his wife and children, at the time it was made.

The answer of defendant admitted most of the facts alleged in the bill, but stated that at the time of the sale, he had told complainant, that as to the 170 acres in question, he had no written title; that his representation was, that Smith had made him a verbal gift of that part of the land, and that he had held it adversely for more than seven years; so that the Statute of Limitations would protect him. He admitted that he knew of the deed from Smith to his wife and children, but stated that he had consented to its execution; but stated, that when applied to by the person who drew it up, to know whether he would feel hurt with him if he drew it, he had replied that he would not feel hurt, but that Smith had no right to convey the land.

The motion to dissolve the injunction was made on two grounds:

1st. That there was no equity in the bill, and that complainant had an adequate remedy at Common Law.

2d. That if there was equity in the bill, it was sworn off by the answer.

The motion was refused by the Court, and defendant excepted.

MULLER & HALL; HUNTER; B. P. HALL, for plaintiff in error.

CULVERHOUSE, for defendant.

By the Court.—BENNING, J. delivering the opinion.

The first two questions are confined to the bill. They are these (assuming the bill to be true):

1. Does the bill contain any equity?

2. Is not the case made by the bill, one for which there is an adequate remedy at Law? This last question is, indeed, included in the first.

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[1.] If the seller knows of a defect in the title to a part of the thing sold, which is material to the enjoyment of the rest, and he does not disclose this defect to the buyer, much more, if he represents to the buyer that no such defect exists, and the buyer buys, ignorant of the defect, the buyer, although he has taken a deed, may, in Equity, have a rescission of the sale. (1 Sug. Vend. 381. *Edwards vs. McLeary*, 2 Swans. 287. *Goffe and others vs. Newsom*, 2 Kelly, 460).

Taking the bill to be true, Crutchfield, the seller, in this case, had no title to a part of the land sold by him, namely, one hundred and seventy of the five hundred and fifty-three acres—the part, too, on which stood the dwelling-house and all the other houses.

And yet, he represented to Danilly, the purchaser, that he had a good title to this part—represented that his father-in-law, Smith, had given him this part, and that, under the gift, he had held possession of it for more than seven years.—whereas, the fact was that Smith had not given him the part, but by deed had given the part to Crutchfield's wife and children, by a deed, to the making of which, he, Crutchfield, had consented. And all about the making of this deed, Crutchfield concealed from Danilly.

This part of the land was very material, too, to the enjoyment of the rest. The bill says, “and that without this part, the balance would be altogether valueless to your orator, for the purpose for which he intended said lands; that your orator purchased the aforesaid lands upon the aforesaid representations of respondent, your orator having full faith in respondent, for the purpose of a dwelling and farm; that the settlement and dwelling, &c. above described, was the chief inducement to your orator in the purchase”.

All which contents of the bill being taken to be true, it follows, by the principle of law above stated, that Danilly, the purchaser, was entitled, in Equity, to have a rescission of the sale.

Not, certainly, if he had an adequate remedy at Law. Did he have an adequate remedy at law?

It was contended for the plaintiff, Crutchfield, that for the

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injury in this case, a payment in money, by way of damages, would be an adequate remedy. But what would be the measure of such damages? The injury consists in the loss of nearly a third part of the whole quantity of land supposed to be purchased. How would the loss of such part affect the value of the rest? This depends on a variety of things; and any estimate on the subject would have to partake much of the character of conjecture.

Then the place of settlement was on this part. On it were all the buildings. How are the comforts and enjoyments of home to be estimated in money?

Say, however, that this is a case in which the injury might be measured in money, still the remedy at law is not adequate. There is no certainty that money will be forthcoming to pay for the injury. It is not certain that Crutchfield will be able to pay the money needed for compensation. The chances are that he will not be.

The bill states, that the negroes claimed by Crutchfield, or the greater part of them, are in the same situation as the one hundred and seventy acres of land; that they and the land were given, by Danilly, to Crutchfield's wife and children, in the same deed.

The bill also states that Crutchfield had been engaged in "mercantile transactions," and "was largely indebted"; and that, consequently, Danilly had reason to fear, and did fear, that he, (Crutchfield), would not be able to make good his warranty, if he, Danilly, should lose the land.

Assuming these statements to be true, it cannot be said that Danilly, in the covenant of warranty, has an adequate remedy at Law—that he has a probability, even, of realizing what he might recover at Law, viz: so much money.

The bill, if true, makes, therefore, a case for a Court of Equity. Has the case, thus made, been denied by the answer? That is the remaining question.

The answer admits most of the statements of the bill. It admits that Crutchfield had notice of the intention of Smith, his father-in-law, to make the deed to the wife and children.

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The answer does not deny that Crutchfield had reason to believe, and did believe, that Smith had made the deed purportant to this intention. On the contrary, the answer admits that Crutchfield had heard a report that Smith had signed "such a paper"; and yet, it does not pretend that Crutchfield communicated to Danilly, anything whatever, with respect to this deed and the consequent claim of Smith to the land, which the making of the deed, by him, implied. So far from it, the answer says that Crutchfield told Danilly that Smith had given him, Crutchfield, the land. And then the answer also admits that Smith's possession was one without any color of title. To be sufficient, therefore, to give, by help of the Statute of Limitations, a good title to the whole one hundred and seventy acres, it had to be a *possessio pedis*—an actual possession, by use and enclosure (or something equivalent) of the whole one hundred and seventy acres. Was it such a possession as this? The answer does not say that it was, but says what justifies the inference that it was not.

[2.] The case made by the bill, therefore, has not been denied by the answer. And even if it had been, a dissolution of the injunction would not follow as a necessary consequence. Even in such an event, there is a discretion in the Court, as to whether or not the injunction shall be dissolved. This has several times been decided to be so by this Court.

The judgment of the Court below, ought, therefore, to be affirmed.

Haley et al. vs. Reid.

No. 43.—JOHN J. HALEY, *et al.* plaintiffs in error, vs. JOHN B. REID, defendant.

[1.] Stock in a corporation is not subject to be levied on, under an attachment against the owner of the stock.

Attachment, in Spalding Superior Court. Decided by Judge STARK, May Term, 1854.

John B. Reid had sued out an attachment against John J. Haley and David S. Mills; which attachment had been levied by the Sheriff, on stock of defendant in the Griffin and West Point Plank-road Company; the levy being made by entry to that effect, on the attachment by the Sheriff. At the term to which the attachment was returnable, the Counsel for defendants moved to dismiss it on several grounds, the only one of which necessary to be stated was, that an attachment cannot, under the laws of this State, be levied on stock of an incorporated company.

The Court over-ruled the motion, and defendants excepted.

HALL & CAREY; GREEN; MARTIN, for plaintiffs in error.

McCUNE, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] Can an attachment, against a stockholder in a corporation, be "served and levied" on the stock of the stockholder, in the corporation? This is the only question which it is necessary to decide in this case.

The attachment, in this case, was not served by summons of garnishment—by a summons of garnishment treating the corporation as the debtor of the defendants in the attachment, for so much stock held in the corporation by the defendants. I do not mean to say that the attachment might have been served in that way. I express no opinion, as to whether such a garnishment would lie, in such a case, or not. In the case, however, as it is, attachment by the garnishment mode was not

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attempted. The Sheriff's return is, "I have levied the within attachment, on one hundred shares in the Griffin and West Point Plank-road Company.

May an attachment be thus levied on the debtor's stock in a corporation?

The Attachment Act of 1799, makes it the duty of the officer, who is to execute the attachment, "to serve and levy the same upon the estate, both real and personal, of such debtor".

And the nineteenth section in the charter of the Griffin and West Point Plank-road Company, declares, "That the shares in the stock of said company shall be deemed personal property, and may be transferred as shall be prescribed by the by-laws of such company". (*Pamph. Acts of 1849*, 231.)

As to the stock, then, in this particular corporation, it, at least, is to be deemed personal property.

Still, although personal property, is it subject to attachment?

Attachment becomes a means of transferring the property attached. That property, first or last, has to be sold to satisfy the attachment. But for the transfer of this sort of personal property, this stock, in this corporation, another mode is, by the charter itself, provided, namely: such a mode as may have been prescribed "by the by-laws of such company". And what reason is there why, in the interpretation of these words of the charter, the maxim *inclusio unius exclusio alterius*, should not apply? I know of none.

Interpreted by this maxim, this part of the charter repeals the Act of 1799 if, indeed that Act, itself, intended to make stock of this kind subject to be attached, as this stock was attached.

But did that Act intend to make such stock, so subject, to be attached?

The words of that Act, as we have seen, are "the estate, both real and personal"—the attachment is to be levied on "the estate both real and personal". This Act was passed on the 18th of February, 1799. (*Marb. and Graw. Dig.* 41.)

Two days before an Act in *pari materia*, having in it the same words, had been passed by the same Legislature, viz: the

Judiciary Act of 1799. The thirty-first section of that Act declares, "That all executions may be levied on the estate, both real and personal, of the defendant or defendants". (*Id.* 401.)

And by Legislative interpretation, these words in the Act of 1799, do not include stock owned by any person in a corporation, for in 1822 the Legislature passed an Act, "to make bank and other stock subject to execution," which of course, it would not have done, if it had considered such stock already subject to execution by the Act of 1799.

This interpretation, it is believed, was that which was put upon these words also by the Judiciary.

And it does not seem very easy to put any other on the words. To "levy" means to seize—to take corporeally. It allows that what cannot be seized—what cannot be taken corporeally, cannot be levied on. And as the law is not to be presumed to require impossibilities, when it requires an executing officer to levy on both personal and real estate, it is not to be assumed to intend to require him to levy on such personal or real estate as it is impossible to levy on; that is to say, as it is impossible to seize—to take corporeally. What precise idea the Sheriff meant to express by the word "*levied*," when he returned that he had "*levied*" the attachment upon one hundred shares in the corporation, I am at some loss to conceive.

If the words "estate, both real and personal," in this, the first Judiciary Act of 1799, are not sufficient to include stock owned by individuals in corporations, the same words in the Attachment Act, passed only two days afterwards, must be construed, in like manner, not to include such stock; for the Act now mentioned is intimately in *pari materia* with the one last mentioned.

Upon the whole, therefore, it may be said that the attachment having been levied in the manner aforesaid, only upon stock owned by the defendants in a corporation, was not well levied; and therefore, that it should have been dismissed; and that the Court below, in not dismissing the attachment on that ground, erred.

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No. 44.—ALEXANDER THOMPSON, plaintiff in error, vs. WILLIAM MANLY and others, defendants in error.

[1.] A demurrer will lie to a bill in Equity, when there is an adequate remedy at Law.

In Equity, in Carroll Superior Court. Decision on demurrer, by Judge WARNER, June Term, 1864.

This bill was filed by Alexander Thompson against William, Peter and John Manly, Joseph R. Richards, John Long and B. M. Long. The bill states, that at the February Term, 1853, of Carroll Superior Court, an action of ejectment was commenced by John Doe on the several demises of William, Peter and John Manly, heirs at law of William Manly, deceased. Joseph R. Richards and John and B. M. Long against the complainant, as tenant in possession, for lot of land number ninety-six, in the ninth district of Carroll County; to which action complainant filed the pleas of not guilty, and Statute of Limitations; that at the August Term of said Court, 1853, a trial was had, and a verdict rendered for the plaintiff; from which complainant has entered an appeal. The bill charges that the plaintiffs in ejectment rely for a recovery, upon a plat and grant from the State to the heirs at law of Wm. Manly; and that William, Peter and John Manly are such heirs; and that they gave in and drew said lot; (the said plot and grant being in possession of John and B. M. Long) also upon a deed from said William, Peter and John Manly to Joseph R. Richards, dated 2d Dec. 1851, for and in consideration of the sum of \$75; and upon a deed from Richards to John and B. M. Long, dated 20th Sept. 1852, for and in consideration of \$175.

The bill further charges, that at the time the Manlys sold to Richards and Richards to the Longs, the land was worth \$800, and is now worth \$1000; that complainant purchased said lot in the year 1850, from Samuel Bowling, who, together with those under whom he claimed, had held the actual, peaceable

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and notorious possession of the same from the year 1831 or 1832, under color of title and claim of right; that he, complainant, purchased said lot in good faith, believing he bought a good title; went into possession and made valuable improvements, thereby greatly increasing its value; that complainant continued in open, notorious and peaceable possession of said land, up to the commencement of said action of ejectment; that said Manlys, on the 2d day of September, 1851, sold and conveyed said lot of land to Richards, (they having drawn said land as the heirs at law of Wm. Manly) without having been in possession of said land or of the remainder and reversion, or having received the rents and profits of the same, for the space of one whole year, next before the said bargain and sale and conveyance, contrary to the Statute of *Henry VIII*; that said Richards purchased said land, knowing that Manlys never had been in possession of the same; that Richards sold and conveyed the land to the Longs in September, 1852, without having been in possession, and while complainant was in possession thereof. The bill further stated that complainant was unable to prove that Richards knew, at the time he purchased of the Manlys, that they never had been in possession of the land, and that the Longs knew that Richards never had been in possession of the land, except by resorting to the consciences of the defendants.

The bill further charges, that by the sales and conveyances made by the defendants, as aforesaid, the said Manlys had forfeited one-half the value of said land, to-wit: \$400: the said Richards had forfeited \$800, and the Longs one-half of the value of the land, to-wit, \$400; that the Manlys were insolvent; Richards was a foreigner by birth; that the Longs are using the names of the Manlys and Richards in the action of ejectment, they being nominal parties, and having no interest in the land. The prayer of the bill was for a perpetual injunction against the action of ejectment.

The defendants demurred to the bill, for want of equity, alleging that plaintiffs had an adequate remedy at Law.

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The Court sustained the demurrer and dismissed the bill, and Counsel for complainant excepted.

POWELL, for plaintiff in error.

WRIGHT & BURK, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] The substance of the complaint in the bill is, that the lessors in the ejectment, who are the real parties, have no title deeds except such as are void by the Statute of the 32d Henry VIII. entitled "The bill of bractry and buying of titles", and that they are using the grant from the State to the Manlys, as a means to recover the land in the face of that Statute.

But those lessors claim under the Manlys, and according to *Pitts vs. Bullard*, (8 Kelly 17) they have the right to use the grant for such a purpose.

Not only is this so, but it appears from the bill, that the complainant has a perfect legal title to the land—a perfect title under the Statute of Limitations. By means of this, he can defend himself against the ejectment. What aid then does he need from a Court of Equity? None.

Clearly there is no equity in this bill.

No. 45.—L. PITTS and another, administrators, &c. plaintiffs in error, vs. NATHAN F. HOOPER, defendant in error.

[1.] An answer is not sufficiently full, unless the defendant, according to the best and utmost of his knowledge, recollection, information and belief, makes a full, true and direct response to all and singular the several matters con-

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tained in the bill, and that as particularly as if there were an interrogatory to him, founded on each separate matter.

In Equity, in Houston Superior Court. Exceptions to answer. Decision by Judge HARDEMAN, May Term, 1854.

Hooker commenced suit against the administrators of William J. Coalson and Joseph Tooke, on a note for \$4,500, dated the year 1845. The defendants in those cases filed a bill enjoining Hooker from prosecuting the same. This bill professed to give a history of all the transactions between Hooker and Coalson, commencing with the purchase of a tract of land in 1836, and continued down to the death of Coalson. The bill alleged, specifically and minutely, sundry usurious transactions between these parties, and by interrogatories, called the attention of the defendant particularly to the specific usurious transactions alleged. To the bill were annexed, as exhibits, copies of various letters from Hooker to Coalson, dated at various times during these transactions, and many expressions in them were charged to refer to usurious interest paid; and the defendant was called upon, in his answers, to explain their meaning. The object of the bill was to seek discovery of the usurious interest, paid during the various transactions between Hooker and Coalson—the amounts, dates, and the appropriation thereof.

The answer of Hooker admitted that he had various transactions with Coalson, in his lifetime, and that he had received some usurious interest from him, which he set out in his answer, as to amount and time. He added, that it was utterly impossible for him, after the lapse of so many years, to answer, with any accuracy, the various and complicated interrogatories contained in the complainant's bill of complaint; that it was eighteen years since he made the contract with Coalson; that defendant is a plain farmer, unacquainted with the management of business matters—keeps no books, and does not preserve his correspondence; that he is considerably advanced in years, and his memory frequently at fault; that the intercourse between him and Coalson was of the most friendly character, and

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that it was impossible for him to detail their various transactions; that since receiving a copy of the bill (he lived in North Carolina) he had sought, diligently, to get together all the letters he had received from Coalson; and that he attached to his answers all that he had found; that he also attached every paper in his possession, touching the transactions referred to.

To this answer the complainants filed thirty-nine exceptions, for insufficiency, in not answering the several specific interrogatories in the bill.

The presiding Judge over-ruled the exceptions, and held the answer to be sufficient. Error has been assigned on each exception, and on the general order.

WARREN & HUMPHRIES, for plaintiff.

GILES, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] The answer in this case labors under one general defect. The responses which it makes to the allegations and interrogatories in the bill, are, for the most part, too *general*. They do not meet the allegations and the interrogatories, allegation by allegation, interrogatory by interrogatory. The answer is not, by a great deal, as particular and minute as the bill is.

The answer is defective too, but in a less degree, in not setting forth, in some instances, the *belief* of the defendant.

It is true that the bill is so drawn as to make it a most tedious affair to answer it well. The statement of facts is not thrown into paragraphs; kindred, if not the same topics, are sometimes inserted in separate places; the interrogatories run even on, like the statement, with scarcely a break in them; still, the bill is such an one as must be well answered.

The question, whether an answer is sufficiently full or not, may be determined by comparing the answer with the sort of answer which the bill, itself, calls upon the defendant to make. In *Daniel's Chancery Practice*, it is said that "the nature of

the answer which a plaintiff has a right to require from each defendant upon the record, is sufficiently shown by the form of words made use of in the bill for requiring an answer, viz: "that the defendant may, upon his corporeal oath, according to the best and utmost of his knowledge, recollection, information and belief, full, true, direct, perfect and sufficient answer make to all and singular the several matters and things hereinbefore contained; and that as fully and particularly as if the same were here again repeated, and be thereunto severally and distinctly interrogated". (2 *Darl. Ch. Pr.* 246.) This is no doubt true.

The answer, then, is to be such as these words require; and that whether the words are in the bill or not. The answer is to be made to all and "*singular*" the "*several* matters" in the bill, and according, not only to the defendant's knowledge, but also according to his "recollection, information and belief." Each sentence, each allegation, each question, must receive its own particular answer. Of course, if the answer or answers to the interrogatory or interrogatories founded upon an allegation, are a full answer to the allegation, a separate answer to the allegation need not be also given.

The answer, in this case, did not come up to what is thus required. The respects in which it is deficient, have already been indicated.

And because the answer did not, it was excepted to. Most of the exceptions were well founded. They should, therefore, have been sustained. The judgment will indicate, particularly, which they are that are sustained, and which over-ruled.

Jordan, administratrix, &c. vs. Jordan et al.

No. 46.—MARY J. JORDAN, adm'x, &c. plaintiff in error, vs. BENJ. S. JORDAN et al. defendants. BENJ. S. JORDAN, plaintiff in error, vs. MARY J. JORDAN, adm'x, &c. defendant.

- [1.] A remitted judgment of the Supreme Court, is to have as much operation and effect in the lower Court, when there has been no *superiority* that Court, as when there has been one.
- [2.] An amendment to a bill, which, in itself, would make a case that has in it no equity, which, and if added to the bill, would render the bill multiplicitous, will not be allowed, especially if one of the effects of the amendment would be to compel the defendants to come to trial in a different county from that of their residence.
- [3.] An answer is full when the defendant, according to the best and almost of his knowledge, recollection, information and belief, has made a full, true and direct answer to all and singular the several matters contained in the bill; and that as particularly as if he were distinctly interrogated on each separate matter.
- [4.] A bill cannot be taken as confessed against a defendant, as long as a plea, in bar of the latter, remains undisposed of.

In Equity, in Troup Superior Court. Decided by Judge WARNER, May Term, 1854.

The bill in this case alleges, that on the 23d day of September, 1842, Benjamin S. Jordan, Farish Carter and Warren Jordan and Reuben Thornton entered into an agreement, in writing, that Benjamin S. Jordan and Farish Carter, should gather up the property of Warren Jordan, and bring the same to sale, by virtue of certain mortgage liens which they held against Warren Jordan, or otherwise, as might be practicable, That said B. S. Jordan and Carter should attend the sales and buy in all the property; that it would not bring its value at such sales, and re-sell the same at fair cash prices; that the proceeds should be applied to the payment of the expenses incurred in bringing the property to sale, and then to the payment of the debts or claims which B. S. Jordan and Carter held against Warren Jordan until they were paid, and the balance remaining, should be settled on the wife and children of Warren Jordan. Thornton engaged, in the contract, to assist

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paying out this contract; and for which he was to be paid the proceeds, a reasonable compensation.

The bill sets forth the debts then held by B. S. Jordan and fit against Warren Jordan, to be paid by this agreement—among them a note due to Benjamin S. Jordan, for \$4,860, a mortgage, purchased from the Georgia Rail-road & Bank Company, for about \$15,000, and transferred to Farish et al; but which the bill alleges, was really purchased by B. Jordan and Carter jointly. The bill sets forth, minutely in detail, a large amount of property, real and personal, put to sale in Hall County and Baker County, Georgia, also in the Territory of Florida; that Carter and Jordan bid in the property, and instead of causing it to sell fairly, they resorted to many fraudulent devices to by which to depreciate it, so that by such false and fraudulent sales they became the purchasers of property fairly worth One Hundred Thousand Dollars, for about Twelve thousand Dollars; and that instead of re-selling it, as they were bound to do by the agreement, they had appropriated it to their own use, and had refused to credit the debts with the small sums for which the property was bid off by them. The bill alleges, as one reason which induced the defendants to act in this fraudulent manner, the fact that Warren Jordan became infirm and much enfeebled in body and mind; and that he believed he would never be able to bring them to an accounting. The bill distinctly alleges that they recovered property sufficient, at a fair cash value, to pay all their debts and expenses, and leave a balance of \$75,000; and sets forth the property purchased at each sale specifically, and the frauds practiced at each sale, and the prices at which it was bid off. The bill also alleges that they had recovered other property, which they never brought to sale, and never credited at any sum, but appropriated. Warren Jordan died soon after these transactions, and Reuben Thornton also afterwards died. The defendant administered on the estate of Warren Jordan, but Reuben Thornton died insolvent, and had no administrator; this is stated as the reason why he was not a party to the

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original bill, but also states that before his death he had sold a negro of Warren Jordan, and had not accounted for the proceeds.

The bill further alleges, that Benjamin S. Jordan and Elijah Carter still held open their claims against Warren Jordan, and pretended that they were unpaid; and that B. S. Jordan had instituted his action at Law in Troup Superior Court, against the complainant, as administratrix of Warren Jordan, on the note for \$4,360, and that Carter was jointly interested with Jordan in the recovery sought on this note, and that they jointly planned and executed all the frauds charged, and were jointly interested in the spoils: that many of the facts alleged, the complainant was unable to discover, without a resort to the consciences of the defendants, and that the defendants had taken charge of many of the papers in the case, and kept them, and prayed that they be required to exhibit them for use and inspection. The bill prays an injunction of the Common Law action, that the defendants be compelled to account for the property at a fair cash value, and compelled to credit the proceeds upon their claims, until satisfied, and that the contract be specifically performed. There are several alternative prayers in the bill on this state of facts. The bill was returned to the November Term, 1852, of Troup Superior Court.

To this bill, the defendants filed their several demurrers and pleas to the jurisdiction of the Court of Chancery of the County of Troup, on the ground that both the defendants resided in the County of Baldwin, and accompanied their pleas with an answer in support of the pleas, specially denying that Carter had any interest in the note sued on at Law. These demurrers and pleas were over-ruled by the Judge of the Circuit Court, at the May Term, 1853, and the defendants sued out a writ of error to this Court, returnable to the August Term, at Decatur, 1853, at which Term, the cause was continued, and was afterwards determined at Macon, February Term, 1854. And the decision upon the writ of error was, that the Court of Chancery of Troup County had jurisdiction for the purposes of *discovery* only; but that the *relief* sought must be sought in the County

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of Baldwin, as there was no defendant to the bill, in the County of Troup. In the mean time, as the defendants obtained no *supercedas*, the cause was progressing in the Circuit Court, pending the issue on the writ of error in the Supreme Court. An order was passed at the November Term, 1853, giving the defendants until the 1st of April, 1854, to answer the bill, and in default of answer, it was to be taken as fully and finally confessed. In March, 1854, on application by the Solicitor of the defendants, the Solicitor for the complainant extended the time for answer from 1st of April to 1st of May; and accordingly, by this time, B. S. Jordan filed his answer, but Carter did not answer.

In the mean time an administrator on the estate of Reuben Thornton had been appointed in the County of Troup, and before the return of the *remittitur* from the Supreme Court, the complainant filed an amendment to the bill, making his administrator a party defendant, and also making the widow and children of Warren Jordan parties complainants. The amendment further alleged, that the administrator of Reuben Thornton was claiming a considerable amount as due for the services of said Reuben, in bringing the property to sale, and for money advanced by him in the execution of the agreement; and prayed a discovery from Jordan and Carter, and the said administrator, as to the services rendered, the money advanced (if any) and the amount which had already been paid him by Jordan and Carter from the proceeds of the sales; and also prayed that if, on the final accounting, any sum was due Thornton, that the value of the negro sold by Reuben Thornton might be set-off to this amount, as the estate of Thornton would be otherwise unable to account for the value of this negro. This amendment also set forth a large amount of other property and money, which had been received by B. S. Jordan and Carter, not stated in the original bill, but discovered since, and added another prayer for relief. It was also agreed that this amendment should serve the purpose of an amendment and a supplemental bill. To the allowance of this amendment, the defend-

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ants objected—1st. Because, before it was filed, the Supreme Court had, by its decision, made the original bill a bill for *discovery* only, and that such a bill could have no more parties than existed in the Common Law record, in aid of the prosecution or defence, of which the discovery was sought.

2d. Because a bill for discovery could not be converted, by amendment, into a bill for relief. The motion to amend was argued at the last May Term of Troup Superior Court, and the amendment was not allowed, and to this ruling the complainant excepted.

The complainant also filed exceptions to the answer of B. S. Jordan, as insufficient and evasive in many points. On the argument, the Court below sustained three of these exceptions, and ordered the said B. S. Jordan to answer over; and to this ruling the defendant, B. S. Jordan excepted; and also sued out his writ of error to this Court.

The remaining exceptions were over-ruled by the Court below, and the complainant excepted.

During this same term of the Superior Court, the *remittitur* from the Supreme Court, containing the decision of that Court on the former writ of error, was returned; and the defendants moved to make it the judgment of the Circuit Court at that time, and to vacate the proceedings had in the Circuit Court pending the issue for the writ of error in the Supreme Court—especially so far as such proceedings were inconsistent with the case, as a case for *discovery* only. To this the complainant objected, and insisted that as the defendants had sued out *no supersedeas*, and had progressed with the case voluntarily, they were bound by the proceedings; and that they had thus waived objections to the jurisdiction, and moved the Court to qualify the order entering the *remittitur*, so that it should not prejudice their subsequent proceedings. The Court refused to qualify the *remittitur*, and decided that the proceedings in the Circuit Court, pending the writ of error in the Supreme Court were void; and to this decision the complainant excepted. On a subsequent day in said term, the complainant moved an order absolute, taking the bill confessed, as to Carter, which or-

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for the Court below refused, and this also is assigned for error.

The several exceptions in these cross-writs of error, are now assigned in a consolidation of the records, as errors in the Court below, and asked to be reviewed by this Court.

B. H. HILL, for plaintiff in error.

C. J. McDONALD and H. WARNER, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

In this case the cross-bills of exceptions were heard together.

One of the assignments of error made by Mrs. Jordan on her bill of exceptions was, that the Court below gave too much effect to the judgment of this Court, which had been remitted to that Court. It seems that the bill of exceptions, on which that remitted judgment had been rendered, had not been made to operate as a *supersedeas*, and so that subsequent to the allowance of that bill of exceptions, steps in the case had been taken in the Court below, as if no bill of exceptions had been allowed; and that when the *remittitur*, with the judgment of this Court on the bill of exceptions reached that Court, the judgment was held by that Court to operate as if there had been a *supersedeas* in the case—as if, since the allowance of the bill of exceptions, no steps at all had been taken in the case. On this holding of that Court, Mrs. Jordan found one of her assignments of error.

The fifth section of the Act of 1845, which organizes this Court, contains, among others, these words: "Upon the decision of said Supreme Court on matters of Law or principles of Equity, which may arise in the bill of exceptions," "the Court shall cause to be certified to the Court below such decision, and award such order and direction in the premises, as may be consistent with the law and justice of the case—which decision, so rendered, and order and direction so awarded, shall be respected and carried into full effect by the Court below". (*Cobb's Dig.* 450.) The decision remitted is to be respected and car-

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ried into *full* effect. This is the language of the Statute. And if the law were different, what would the higher Court be worth?

What odds does it make that a *supersedeas* is not obtained? Whether there shall be a *supersedeas* or not, is optional with the party excepting. If he does not do what is necessary to make his bill of exceptions operate as a *supersedeas*, the other party may go on with the case or not, at his pleasure. If he chooses to go on, he must do so at his peril. Taking the chances of an affirmance, he must run the risk of a reversal; and as by an affirmance he would gain all the ground he passes over, so by a reversal he must lose it all. The words which I have quoted, defining the effect and operation which a judgment of this Court is to have in the Court below, come in the Statute after the words which relate to a *supersedeas*, and therefore they cover cases in which there may have been no *supersedeas*, as well as those in which there may have been one.

1. The Court below was right, therefore, in holding that the judgment of this Court was to have as much effect and operation, although there had been no *supersedeas*, as it would have had, had there been a *supersedeas*.

The important assignment of error on the part of Mrs. Jordan, is that which she founds on the refusal of the Court below, to receive her offered amendment of the bill.

The bill, as it stood under the remitted judgment of this Court, was only a bill for discovery. The effect of that remitted judgment was, that as Carter and Jordan, the defendants in the bill, resided in Baldwin, the Court in Troup had no such jurisdiction over them as to authorize it to retain the bill against them as a bill for relief, although it might retain it as a bill for discovery.

The amendment, had it been allowed, would have had the effect to turn the bill, thus being a bill for discovery only, into one for general relief and discovery, and so to compel the defendants, Carter and Jordan, to come out of the county of their residence, Baldwin, and defend themselves in Troup, generally, against all the matters that would be contained in the bill. The

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matters already contained in the bill were many, various and somewhat complex; and they were made the foundation for a claim on the part of the plaintiff, amounting to from \$75 000 to \$100 000. And the matters contained in the offered amendment were such, that if the amendment had been received, they must have rendered the bill much more bulky and complex than it already was.

The effect, then, of the amendment had it been received, would have been to force Carter and Jordan to leave Baldwin, the county of their residence, and come to Troup, the County of the residence of the plaintiff, to defend themselves against a case of such magnitude as this. And to produce that effect was doubtless the sole purpose of the amendment, as will be seen from what was the nature of it.

What was the nature of it? Was it of such a nature that it would have warranted the Court below in receiving it to produce the aforesaid effect? This is the precise question.

Among the things which the amendment proposes to do, is to make Anthony R. Thornton, as the administrator of Reuben Thornton, deceased, a party defendant to the bill; and to state, in substance, that Carter and Jordan owe him, as such administrator, a debt; and that he owes Mrs. Jordan, as administratrix of Warren Jordan, another debt: and that the estate of Reuben Thornton which he, Anthony, represents, is insolvent—not that he, *Anthony*, is; all to the end that Carter and Jordan may be prohibited from paying him, Anthony, the debt which they owe him; and may be compelled; instead, to pay the debt to her, Mrs. Jordan, in satisfaction of the debt owed to her by Anthony.

Is what is thus proposed to be stated, by way of amendment, of such a character that it would have warranted the Court below in receiving it—in receiving it to produce the aforesaid effect; for if it is not, there clearly is nothing proposed to be stated, which is.

It is not of such a character, and for two reasons—First. What is thus proposed to be stated, makes such a case that if taken by itself, it has in it no equity; and if taken as

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part of the bill, it deprives the bill of all the equity which it has in it, by rendering the bill multifarious.

As to the first reason. As long as Anthony R. Thornton is *himself* solvent, the creditors of the estate he represents cannot come to loss by any mal-administration of the estate, on his part; and this whether the *estate*, itself, is solvent or insolvent. For any mal-administration he will be personally liable to these creditors; and being solvent, he will be able to make good any personal liability. This being so, what principle is there, of Law or Equity, that will justify those creditors to interfere with his administration, by compelling his debtors to pay their debts to them, rather than to him? There is none. Such interference is allowable only when the administrator is personally insolvent, so that it would be dangerous to trust the assets in his hands, or when some similar reason exists. The insolvency of the *estate* represented by the administrator, is not a similar reason.

As to the second reason. Even if the matter thus proposed to be stated, by way of amendment, contained in itself equity; yet, it is such matter as makes a complete, new and independent case—a case that might well exist in a separate bill—a case which does not need any help from the old bill—a case to which the old bill could render no help. Such matter, if added to the old bill, would make that bill multifarious. This is clear.

Now the question is, would the Court have been warranted in receiving, by way of amendment to the bill, such matter as this—matter making a case that, in itself, had no equity in it—matter that, if added to the old bill, would have rendered that bill multifarious—when the effect of receiving it would have been to force the defendants, Carter and Jordan, to leave their county and come to the plaintiff's county, to defend themselves against all the matters that the bill, with these additions to it, would have come to contain?

In what cases may persons be sued out of the county of their residence? It is a general rule; that all cases, whether at Law or in Equity, over which the Superior or Inferior Court or

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Courts have jurisdiction, are to "be tried in the county wherein the defendant resides". This rule, as to cases at Law, is the direct command of the Constitution itself; and as to cases in Equity, it is, if not the direct command of the Constitution, of which there is great doubt in my mind, the result of a well settled principle of Law, viz: the principle, that Equity follows the Law. And ought it not, much more, to follow the Constitution? This is the general rule. To this general rule, however, the Constitution has, itself, made exceptions. It excepts the case of joint promissors and joint obligors, of whom some reside in one county and some in another; also, the case of indorsers residing in a different county from that of the maker. And the Constitution makes no other exceptions. Ought Courts of Equity to do what the Constitution has not done? Ought they to make exceptions which the Constitution, although having in mind the subject of exceptions, has not thought fit to make? Ought they to do this in the face of the fact that the expression, "all civil cases" in this command of the Constitution—"all civil cases which shall be tried in the county wherein the defendant resides", when taken according to its common legal import, includes cases in Equity? I must express my doubt whether they ought or can.

Ought not the case which they should select as an additional exception, to be one in which there should, at least, be some equity against each defendant, and some privity, as between all the defendants? Ought the case to be such, that as to those of the defendants who might reside in the county in which the suit might be brought, it should be a case which would have in it no equity, for the reason, that as to them, there would be an adequate remedy at Law; and as to them ~~and~~ the other defendants—those to be brought out of their counties, it should be a case which, for another reason, would have in it no equity, viz: the reason that, as to all, it would be nullification? Most certainly it ought not to be. Therefore, Courts of Equity ought not to make the present case an additional exception.

Indeed, if the case were such as not to have in it this ques-

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tion of jurisdiction, growing out of the fact that the residence of the defendant is in a different county from that in which the suit has been brought, if it were the common case in which all the defendants reside in the county of the suit; still, such matter as that in question, proposed to be added to the bill, could not, according to any rule of Equity with which we are acquainted, be admitted into the bill by way of amendment. How much more, then, is this so, the case being as it is?

The decision in *Gilbert vs. Thomas*, (3 *Kelly*, 575,) is a direct authority to show that defendants are not to be brought out of the county of their residence, upon such a case as would be made, if the matter aforesaid were admitted into the bill, by way of amendment.

It was said, by the Counsel for Mrs. Jordan, that these were not the objections to the amendment, presented in argument to the Court below; and it was insisted, that therefore they ought not to be considered by this Court. But the judgment of the Court below is general—is not put on any expressed ground. If any good ground exists for it, ought not this Court, therefore, to presume that to have been the one by which the Court was influenced? Besides, are parties to be restricted in this Court, to the same arguments which they used in the Court below?

The matter aforesaid, then, relating to Anthony R. Thornton, was such as could not properly be allowed to be added to the bill, by way of amendment.

But the amendment containing this matter, was offered as a whole, and was considered as a whole. This part being such as was not allowable, the whole was rendered such as was not allowable.

[2.] The refusal of the Court below, therefore, to allow the amendment, was right.

Still, it is not improper, perhaps, to say that there is matter in the proposed amendment, which it would be right to have put in the bill, viz: all that matter which relates to the possession of the negroes in Florida, by Long, and that which relates to what the defendants realized out of other property

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than the lands and negroes in Hall—the negroes in Florida, and the lands in Baker. These are proper matters for discovery, and would be in harmony with what is already in the bill; and doubtless the Court, on a proper application, would allow them to be added to the bill.

A number of exceptions, for insufficiency, were taken to the answer of B. S. Jordan. Of these, three were sustained by the Court, and the rest over-ruled. To as much of the decision as sustained the three, B. S. Jordan excepted; to the other part, or to most of it, Mrs. Jordan excepted.

The same law is applicable to both parts of this decision.

[3.] When is an answer full? What sort of an answer is a plaintiff in Equity entitled to have from a defendant? In *Daniel's Chancery Practice* it is said, that "The nature of the answer which a plaintiff is entitled to require from each defendant upon the record, is sufficiently shown by the form of words made use of in the bill, for requiring an answer, viz: 'that the defendant may, upon his corporal oath, according to the best and utmost of his knowledge, recollection, information and belief, full, true, direct, perfect and sufficient answer make to all and singular the several matters and things hereinbefore contained, and that as fully and particularly as, if, the same were here again repeated, and he thereunto severally and distinctly interrogated.'" (2 *Danl. Ch. Pr.* 246.)

This is no doubt so. And with this for guide, it becomes a most easy and simple affair to ascertain whether an answer is sufficiently full or not; and guided by this, we find nothing wrong in either part of this decision; and to go into a long detail to show that, would be a mere waste of time.

This judgment, therefore, ought to be affirmed. And this disposes of the case brought up by B. S. Jordan.

[4.] The Court was right in refusing to let the bill be taken as confessed by Carter. His plea—a plea in bar, was still undisposed of. As long as this was so, the plaintiff had no right to call for an answer. The object of the plea was, perhaps, to protect Carter from ever having to answer.

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There is nothing else in the case requiring notice.
The judgments excepted to by both sides ought, to be af-
firmed.

No. 47.—ROBERT COLLINS, plaintiff in error, vs. WILLIAM B.
JOHNSON, defendant in error.

[1.] A person who is an Attorney at Law and engaged in the defence of a
suit, gives to the plaintiff a notice to sue other parties. It is doubtful
whether, in doing so, he acts as Attorney at Law or Attorney in fact:
Held, that he is not, by the Act of 1850, "to regulate the testimony of At-
torneys at Law," incompetent to prove the giving of the notice.

[2.] A draft is payable to "A B Cash." and indorsed "A B Cash": Held,
that *prima facie*, the indorsement is the indorsement of the bank and not
that of A B.

Assumpsit in Bibb Superior Court. Tried before Judge
Powers, November Term, 1854.

This was an action of assumpsit, brought by Johnson against
Collins, on the following bill of exchange:

\$5000.

COLUMBUS, December 15th, 1844.

Ninety days after sight, pay to the order of John Peabody,
Esq. Cash, Five Thousand Dollars, value received—this
place to account of
To W. M. Clark, New York.

D. McDONALD.

Pay Robert Collins, or order.

JOHN PEABODY, Cash.

Pay William B. Johnson or order,

ROBERT COLLINS.

Macon, Georgia, January 1st, 1844. Received on the within
draft from Robert Collins, Thirty Eight Hundred and Seventy-
seven $\frac{3}{4}$ Dollars.

WILLIAM B. JOHNSON & Co.

Per Joshua A. Seagr.

Coffin vs. Johnson.

Macon, November 26th 1848. Received on within draft from Robert Coffin, One Hundred and Sixty-eight \$8. Dollars.

WILLIAM B. JOHNSON & Co.

Per J. S. O'Leary

The defendant pleaded the general issue and the Statute of Limitations; and specially, "that on the tenth day of July, 1861, the defendant, by William R. DeGraffenreid, gave plaintiff written notice to sue said note within the time prescribed by law, and that plaintiff has failed to proceed to collect the same; and that the said John Peabody was cashier of the Insurance Bank of Columbus, in this State, and the said bill of exchange was indorsed by him, as cashier of said Bank, and for the benefit and use of said Bank." On the trial, plaintiff offered in evidence the bill of exchange, together with the following protest and notarial certificate:

"STATE OF NEW YORK, UNITED STATES OF AMERICA.
On the twentieth day of April, in the year of our Lord, 1848, at the request of D. & A. Wesson, I, Alexander Robertson, Notary Public, duly admitted and sworn, in the City of New York, did present the original bill of exchange hereunto annexed to the paying Teller of the LaFayette Bank in this City, where the same is made payable, and demanded of him payment, which he refused, saying, "No Funds". Wherefore, I, the said Notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer, acceptor and indorser of the said bill of exchange, as against all others whom it doth or may concern, for exchange, re-exchange and all costs, damages and interest already incurred, and hereafter to be incurred, for want of payment of the said bill of exchange. This done and protested in the City of New York, in the presence of John Doe and Richard Roe, witnesses.

A. R. ROGERS,

Notary Public.

And I, the said notary public, do hereby certify, that on the

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said 20th day of April, I did duly serve the drawer and indorsers of the said bill of exchange, with notices of the protest thereof, in due form of law, by putting the same in the New York City Post-Office, directed to them, as follows: "D. McDougall, Columbus, Georgia;" "John Peabody, Esq. Cash. Columbus, Georgia; Robert Collins, Esq. Mayor, Georgia;" and a duplicate, "Robert Collins, Esq. Columbus, Georgia" being the reported places of residence, and the Post-Offices respectively nearest them". Duly signed and sealed by

A. B. ROGERS,
Notary Public.

To the introduction of the bill of exchange, protest and notarial certificate, the defendant objected. The Court over-ruled the objection, and defendant excepted.

George S. Obear, sworn, testified, "that he was well acquainted with the hand-writing of Joshua A. Sands, and that the receipt on the bill of exchange, dated Jan. 1st, 1841, was in his hand-writing; that Sands was, at that time, clerk for the plaintiff, and now resides in another State; that witness put on the bill of exchange the credit of 28th November, 1849, by the direction of plaintiff, whose clerk he was, and in the presence of defendant, and told the defendant that it was the amount of his share of the proceeds of sale of stock on joint account of plaintiff and defendant, sold by plaintiff. Defendant took the bill of exchange and looked at it, but said nothing." The plaintiff closed.

Defendant then proposed to prove by William K. DeGraffenreid the service of notice on the plaintiff to sue on the bill of exchange within three months. Defendant objected, on the ground, that at the time of the giving the notice, witness was Counsel for defendant. The Court sustained the objection, and defendant excepted. Upon an agreement between the parties, DeGraffenreid was allowed to testify, and stated that he served the following notice upon the plaintiff on the day it bears date:

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"MACON, July 10th, 1851.

To Wm. B. Johnson: You are hereby notified to commence suit on the above described bill of exchange, within the time prescribed by law, or I shall avail myself of the benefit of the Statute, in such cases made and provided.

ROBERT COLLINS,

Per Wm. K. DeGraffenreid, Att'y."

Richard P. Spencer, sworn by interrogatories, stated: "Was in the Insurance Bank frequently during the latter part of 1841, and saw John Peabody acting in the capacity of Cashier of said Bank, from the first of November, 1841, till the time of his death, in Sept. 1842.

Plaintiff offered, in rebuttal, to read the testimony of John Johnson, taken by interrogatories, as follows: "Witness is Ordinary for Muscogee County, State of Georgia—has examined the records of his office, and can find no evidence of any administration ever having been granted to any person, on the estate of John Peabody, deceased; was acquainted with one person by the name of John Peabody, who resided and died in Muscogee County; knew another by the name of John B. Peabody." To the introduction of which evidence, Counsel for defendant objected. The Court over-ruled the objection and defendant excepted.

Defendant's Counsel then addressed the Jury. Counsel for plaintiff commenced his argument to the Jury, when he discovered that he had failed to prove that Ann E. McDougald (referred to in a certificate of the Clerk of the Superior Court of Muscogee County, subsequently introduced and read to the Jury) was the administratrix of Daniel McDougald, and proposed to re-open the case to prove that fact. This the Court allowed, defendant objecting. B. Hill was then sworn, and testified, "that he was acquainted with Ann E. McDougald, and that she was the administratrix of Daniel McDougald, who was dead", to which defendant objected. The Court over-ruled the objection, and defendant excepted.

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Counsel for defendant then re-argued the case to the Jury, and asked the Court to charge the Jury, that unless plaintiff had shown that he had commenced suit against Daniel McDougald, on the bill of exchange, within three months after the notice to sue had been given to him by defendant, they must find for the defendant, when Counsel for plaintiff asked to re-open the case a second time. This the Court allowed, defendant objecting. Plaintiff then read in evidence a certificate from John R. Sturges, the Clerk of the Superior Court of Muscogee County, dated the 15th day of May, 1852, certifying, in substance, "that Johnson instituted a suit in said Court, against Ann E. McDougald, administratrix of Daniel McDougald, on the bill of exchange, on the 15th day of August, 1851". Also, a certificate of Edward Birdsong, Clerk of said Court, dated the 12th day of November, 1853, stating, in substance, that the declaration and other papers in said case, Johnson against Ann E. McDougald, administratrix of Daniel McDougald, are not to be found in his office". To all of which defendant objected. The Court over-ruled the objection, and defendant excepted.

Counsel for defendant requested the Court to charge the Jury—

1st. In matters of security, the Jury must be satisfied that Collins intended to make the last payment on the bill of exchange.

2d. If done by Johnson, without the concurrence and approbation of Collins, and with a full knowledge of his, Collins' rights, then the credit does not take the case out of the Statute.

3d. If the Court shall hold that the prior indorsers are not liable by lapse of six years, then Collins would have no interest in making a payment on the bill, and the Jury must be satisfied that Collins did intend this payment, on the particular draft sued on: which charges the Court refused to give, and Counsel for defendant excepted.

Among other things, the Court charged the Jury—"That if they believed Clarke lived in the City of New York, plaintiff was excused from suing him; that if Peabody was dead, and

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there was no administration on his estate, plaintiff was excused as to suing him; that as to the Insurance Bank of Columbus, before the Jury could regard that institution as one of the parties necessary to be sued, they must be satisfied, from the evidence, that Seabody was acting for the bank, and not in his individual capacity; that the simple fact that "Cashier" was added to his name, and the other proof, that he was Cashier of the bank at the time, without further proof that this bill was negotiated by him, for and on account of the bank, was not sufficient proof to make it a bank instead of an individual transaction, on his part; that if the Jury believed that plaintiff commenced suit against the representative of D. McDougald, within three months after notice to sue, plaintiff was entitled to recover; that if they believed the payment on the bill of exchange, testified to by Obear, was placed there in the presence of Collins, and with his knowledge, and he did not dissent from the disposition so made of his money, he was bound by it—his silence being equivalent to his assent".

To all of which charges, Counsel for defendant excepted; and upon these several exceptions, have assigned error.

DEGRAFFENBACH; COLE & SMITH, for plaintiff in error.

PER, NISBET & PER, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

There are quite a number of questions in this case, but only two were decided. The decision of these two will, probably, put an end to the case, and the other questions are of little general importance.

Of these two questions, the first is—was Mr. DeGraffenbach, the Attorney for Collins, a competent witness to prove the notice to Johnson, to "commence suit".

The Act of 1850, "to regulate the testimony of Attorneys at Law," declares—"that it shall not be lawful for any Attorney at Law or in Equity, in any case", "to give testimony"

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"of any matter or thing, either for or against his client, the knowledge of which he may have acquired from his client, or during the existence and by reason of the relationship of client and Attorney". (*Cobb's Dig.* 286.)

This Act, as far as it goes, puts Attorneys at Law below the level of slaves, free negroes and convicted felons, for these may testify among themselves. But an Attorney at Law is not allowed to testify at all, as to anything which comes to his knowledge, as an Attorney at Law. As to any such thing as that, he is a person not to be believed on his oath. An Act so harsh—so almost penal in its nature, is certainly not to be enlarged by construction. If, therefore, it is doubtful whether *u. c. 10* falls within or without the Act, a proper presumption will pronounce the case to fall without it.

In giving the notice to "commence suit", did Mr. DeGraffenreid act as Attorney at Law, or Attorney in fact? This is a point left in doubt. There is no doubt that he was Attorney at Law in the defence of the suit. But this Act—the giving of the notice to "commence suit", had, at the time when the Act was done, nothing to do with the defence of the suit. And if the notice had been observed, it would never have had any. This Act was a "matter or thing" independent of the suit—was a matter or thing which it did not need an Attorney at Law to do. It was one which any Attorney in fact, might do, and a lawyer may be an Attorney in fact. The Act was of a kind which it is not usual for Attorneys at Law to do—if, indeed, it was not of a kind which falls wholly out of the province of Attorneys at Law. Could the Attorneys at Law, of Mr. Johnson, have acknowledged service of this notice, so as to bind him? And certainly, if the Attorneys at Law for the plaintiff have no authority, as such, to accept a notice, these for the defendant have no authority, as such, to give one.

[1.] This being so, it is to be presumed that Mr. DeGraffenreid, when he gave the notice, acted as Attorney in fact. And if so, then it follows that he did not acquire the knowledge of the act *u. c.* of the notice which he gave, "by reason of the relationship of client and Attorney".

The Court, therefore, was wrong in holding him to be incompetent to testify of the notice.

[1.] The other question is as to the effect of the addition of the word "cashier" to the name of the payee, in the face of the draft, and to the same name indorsed on the back of the draft. The draft is expressed to be payable "to the order of John Peabody, Esq. Cash." It is indorsed, "John Peabody, Cash." What effect has the word cashier, taken by itself, in this connection?

It is to be presumed that the word was meant to have an effect of some sort. It can have only one of two effects—either to show that a particular person, named Peabody, was meant; viz: that Peabody, who was a cashier, or to show that some bank was meant, viz: that bank whose cashier was named John Peabody. But for the former of these two effects, the addition of the word cashier was not needed. On the contrary, as far as the *indorsement* was concerned, that effect would be better produced by the naked words, "John Peabody" written in the hand of John Peabody. The name and the hand writing would fully identify the writer, while if the word cashier were added, with whatever intent, it would be the means of at least giving rise to a doubt whether the person meant was the private man, John Peabody, or the cashier, as cashier of some bank.

Hence it is, perhaps, that in practice, when men go to bind themselves, personally, they hardly ever add words of any sort to their names. They do not sign themselves A B, Judge, Sheriff, Clerk, Trustee, Executor, Administrator, Guardian, Attorney at Law, President, Cashier, or as the case may be. They sign simply A B.

But if the letter of the two aforesaid effects was the object, then there was a use for the addition of the word cashier; for without that word or something equivalent, there would have been nothing to show that to have been the effect meant.

And not only would there be a use for the word to produce this effect, but the word used in this way would be well adapted

ed to produce the effect. . An indorsement by a bank, in this form—"A B, Cashier," is much more simple and convenient than in this—"The Bank of ———, by A B, its Cashier". More so than in this even—"A B, as Cashier".

And therefore it is, probably, that business—real work—at most universally selects this form. All banks draw and ~~are~~ done in this form. They never, in practice, sign their corporation name to their contracts. They sign the name of their President, or the name of him and that of their Cashier; and when they have done this, they think they have bound *themselves*, and not that their President, or their President and Cashier, have bound themselves.

If, in this case, the word "as" had been put in—if the indorsement had been, "John Peabody, as Cashier", it is hardly to be supposed that a doubt could be entertained, that the indorsement would have been intended to be that of the bank, and not that of the man Peabody, who happened to be the bank's Cashier. But usage, at this day, does not require the employment of the word *as*, to convey such a meaning, if, indeed, usage ever did. A B, Judge, Justice of the Peace, Sheriff, &c. &c. is a form of expression, which by all, is understood to mean the officer, and not the man, as unmistakably as is the expression—A B, *as* Judge, &c. And the latter form is hardly ever used—the former constantly.

Of the two effects, therefore, the latter, viz: that which would make the word cashier designate the bank, and not the bank's cashier, as an individual is, it is to be presumed, the effect intended.

And if this was the intention, there is law to carry it into effect. The law is to be found referred to in *Story on Agency*, §154. The other evidence was such as to authorize the Jury to say what particular bank it was that was meant. It showed that Peabody, when he indorsed the draft, was the acting Cashier of the Insurance Bank of Columbus.

The Court, therefore, instead of charging as it did, should have charged, that the fact that the word cashier was added to the name Peabody, in the indorsement; and the other fact,

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that Peabody was, at the time of the indorsement, the Cashier of the Insurance Bank of Columbus, were sufficient to require them to presume the indorsement to be that of the bank, and not that of Peabody individually.

To come to any other conclusion, would be fraught with, there is no telling how much of evil. All the bank notes that are issued, are signed "A B, President", and countersigned, "C D, Cashier". To hold that the import of such signing and counter-signing, is that A B and C D only, and not the bank, are bound, would produce mischiefs that cannot be foretold.

Doubtless evidence would be admissible to rebut this presumption, as to intention.

No question was made, in this case, as to whether a bill of exchange, of this bank, could be indorsed by the Cashier, alone, so as to bind the bank—whether the signature of the President was not also necessary, and none such is decided.

There ought to be a new trial.

No. 48. FARDY SWEENEY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] An indictment which states the offence, in the terms and language of the Penal Code, is sufficient.

Misdemeanor, in Bibb Superior Court. Tried before Judge Fowles.

At the May Term, 1853, of Bibb Superior Court, the Grand Jury returned a special presentment against Fardy Sweeney, for a misdemeanor. The presentment charged, "that on the 31st day of May, 1853, in said County of Bibb, the said defendant did then and there unlawfully sell to and furnish a certain

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man slave; whose name and owner are unknown to the Jurors aforesaid, with spirituous liquors for his the said man slave's own use, the said Fardy Sweeny not being then and there, the owner, overseer or employer of said slave, and not then there having the said man slave under his custody or care." At the November Term of said Court, the defendant was tried and found guilty; whereupon, his Counsel moved for a new trial and in arrest of judgment, which motion was then and there over-ruled by the Court, and sentence pronounced upon the defendant. At the May Term, 1854, of said Court, Counsel for defendant moved the Court to set aside said judgment, on the following grounds:

1st. Because the indictment was void in not averring the name of the owner of the negro or any other allegation, by which identity might be sustained or proved.

2d. That this defect was not curable by verdict, and might be taken advantage of after verdict.

3d. Because the bill being void, and the verdict not curing it, the judgment rendered thereon was void, and will be set aside on motion, before it is enforced.

The Court over-ruled the motion, and Counsel for defendant excepted.

LOCHRANE & LAMAR, for plaintiff in error.

DEGRAFFENREID, Sol. Gen. for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] The objection to this indictment was, that it was void, for uncertainty. It was insisted that unless the indictment had stated the name of the negro and the name of his owner, the judgment would not serve as a bar to another indictment for the same offence.

But in all pleas of former acquittal or former conviction, the proof of the plea has to consist partly of matter of record and partly of matter not of record. And the identity of the two

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case is the part of the plea which it is the peculiar business of the evidence which is not of record to make out.

If the judgment, in this case, were pleaded to another indictment, as a former conviction for the same offence, the absence of the names of the slave and his owner might make it a little more difficult to establish the identity of the two cases, than it would be had those names been inserted. The difference, however, would be a difference in degree, not in kind.

But whether such an indictment as this might be good at Common Law or not, is a matter of no consequence, as such a one is made good by the Code. "Every indictment or accusation of the Grand Jury shall be deemed sufficiently technical and correct, which states the offence in the terms and language of this Code, or so plainly that the nature of the offence charged may be easily understood by the Jury." This is a part of the first section of the fourteenth division of the Code. (Code § 293.)

The indictment states the offence in the terms and language of the Code.

The judgment ought, therefore, to be affirmed.

No. 49.—MOSES MOUNCE, plaintiff in error, vs. JAMES BYARD & al. defendants.

[1.] The rule, that the vendor's lien shall not be set up, to the exclusion of a bona fide creditor, does not apply to prevent the vendor of a tract of land to J, from insisting on his lien upon the same, as against the rights of W, who becomes security for J upon a promissory note, before the conveyance of the land from the vendor to J, and who receives from J a deposit of the title deeds, for his protection.

[2.] Where, at the time that W thus became security for J, there had been an understanding between them, that J was to give W a mortgage upon a negro slave, for his protection, and J failed so to do: but subsequently, and after purchase of certain lands from another person, by an independent and

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distinct agreement between W and J, the latter deposited the title deeds to these lands with W, as an equitable mortgage, to protect him against the payment of the note, no other advance or consideration having been paid by W: *Held*, that this did not place W in the attitude of a purchaser for valuable consideration, without notice, and give to him a lien on the land, superior to that of the vendor.

In Equity, in Butts Superior Court. Tried before Judge STARKE, March Term, 1854.

This was a bill filed by Moses Mounce, against James Byars, Richard G. Byars, William Byars and John Goodman. The bill stated, that in 1839, complainant owned one hundred and twenty-two acres of land, divided into several lots, and known as a part of the McIntosh or Indian Spring Estates; that he purchased of Robert Coleman, who had purchased at public sale from the State's Commissioners; that Coleman had paid the instalments due the State for the land, the receipt for which payments were indorsed on the certificates of sale given by said commissioners; that Coleman, for a fair and valuable consideration, had transferred said certificates to the complainant; that complainant, on the 13th November, 1839, sold said land to James Byars, for the sum of \$1300, for which he took Byars' notes; the last one of which fell due January 1st, 1842; and that at the time of filing the bill, there remained due complainant, of said purchase-money, the sum of \$625 $\frac{1}{2}$, principal and interest. The bill charges that at the time he sold said land, no grants had been issued for the lots, except lot No. 40, for which complainant executed to Byars a deed in fee simple, and transferred to him the said certificates of sale of the other lots; that Byars went immediately into possession of said lots, under said sale.

The bill charges, that in 1839 or 1840, James Byars sold the land to William Byars, his brother, and immediately thereafter ran away and left the State; and that in a short time William Byars sold, or pretended to sell, said lots to Richard G. Byars and John Goodman, who are now in possession of the same.

The bill further charges, that James Byars, when he left the

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State, took all his effects with him; that complainant took as security on the notes given for said land; and that William Byars, Richard G. Byars and Goodman, at the time they purchased said lots of land, had notice and were apprised of the fact that James Byars had not paid the purchase-money for the same.

The bill prayed that the Court might decree the sale of the land, and order the proceeds to be applied to the payment of his debt against James Byars.

The defendants, William Byars and John Goodman, filed their answers, denying that at the time they purchased said land, they had any knowledge or notice of the purchase-money, or any portion thereof, remaining unpaid by James Byars to the complainant. The defendant, James Byars, having failed to answer, the bill, as to him, was taken *pro confesso*.

It appeared in evidence that the deed of James to William Byars, and the transfer of the certificates of purchase, were intended to secure him against ultimate loss on a certain debt to one William Jones, on which the said William Byars had (before the deed and transfers) become security for James.

Some evidence was adduced for the purpose of bringing home to William Byars, notice of the lien of Mounee for the purchase-money, and also to show notice to Richard G. Byars.

The character of the evidence will be seen from the charge given the Jury by the Court; and upon which the errors alleged in this case are assigned.

The Court charged the Jury as follows: "If the complainant sold this land to James Byars, taking no security for the purchase-money, and conveyed by deed that part to which he had a legal title to the purchaser, and delivered him the certificates for the other lots, and allowed James Byars to go into possession of the land as long as the land remained in the hands of James Byars; the complainant had an equitable lien on the land for the purchase-money, or any balance thereof which might be due him; and if the lands were now in the hands of James Byars, I apprehend there would be no serious difficulty in sustaining the complainant's lien. But if, after the sale by

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complainant to James Byars, and after James Byars was permitted, by Mounce, to go into possession of the land, James Byars, the purchaser in possession, having received from Mounce an absolute deed to one of the lots, and a deposit of the certificates for the other lots; now, if James Byars, to indemnify William Byars against loss, in standing his security to William Jones, executed to William Byars a deed to one of the lots and delivered to him such evidences of title to the other lots as he had received from Mounce, viz.: the certificates of purchase; now, if William Byars, at the time he took the deed and received the certificates of purchase, had no notice that the purchase-money, or a part of it owing to Mounce, was unpaid, then William Byars is an equitable mortgagor, and stands in the position of a purchaser for a valuable consideration, without notice; and if he acted in good faith, he is to be treated as a purchaser in good faith for a valuable consideration, without notice and is protected against complainant's lien. If Richard G. Byars and Goodman are purchasers in good faith and for a valuable consideration from William Byars, and he had no notice, they are as securely protected against complainant's lien as William Byars is, although Richard Byars, at the time he purchased, may have had notice.

The complainant has, in the argument of his Counsel, contended that although William Byars had no *actual notice*, that still, he had *constructive notice*. As a general rule, the law will impute to a purchaser the knowledge of a fact, of which the exercise of ordinary diligence and ordinary prudence would have apprized him. Whatever is sufficient to put the party upon inquiry, is considered, in Equity, to put the party upon notice; and, under these rules, the complainant's Solicitors have contended that as James Byars and William were brothers, James was known to William as a money-borrower, as only having one negro, worth three or four hundred dollars, and some other property only worth a few hundred more; that these brothers had long known each other, and lived only a mile or two apart, William must have been put upon inquiry, and therefore notice was conveyed to him that the purchase-money to Mounce was

unpaid. But in the opinion of the Court, although these things may have been well known to Wm. Byars, yet, they are not sufficient, in law, to charge Wm. Byars with constructive or actual notice. It is the duty of the Court to instruct you as to what facts do or do not amount to notice; whether such and such facts have been proved or not, are facts entirely for your consideration. And you are instructed, that although you may be satisfied, from the evidence, that James and William Byars were brothers, James being known to William as a money borrower, for whom he would not stand without security; although these brothers had long known each other; and although William knew that James had only one negro girl, worth three or four hundred dollars, and some other property, worth some three or four hundred more; and although James and William lived only a mile or two apart, and all these facts may have been well known to William, they are not sufficient, in law, to charge William Byars with notice, in the face of his answer, denying notice. That part of the answer of Wm. Byars, denying notice, is responsive to the bill, and you will not conclude he had notice, unless that part of his answer has been overcome by testimony exceeding and outweighing the testimony of one witness. His having notice after he incurred the liability for his brother to Jones, and took the deed and certificates for his indemnity, does not affect him—the notice came too late. I have been requested by complainant's Solicitors to charge you, "that if this land was transferred to William Byars by James, to secure an antecedent debt, the claim or lien of Mounce is stronger than Byars', unless William Byars, at the time of the deposit of the certificates, made a new advance of money, or in consequence of their deposit, took upon himself some new obligation for James, the claim or equity of Mounce is still the strongest, and has precedence in Equity." In cases of equitable lien, both conflicting liens being equitable, the oldest in point of time has the precedence: but in this case, I do not feel it my duty to charge precisely as requested, but say to you that if, when William stood

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security for James, it was agreed between them that James should secure his brother against loss by a mortgage on a negro, and failed to do so, but disposed of the negro in another way; and if the security agreed on was not given, and afterwards William was secured by a deed to one of the lots, and by deposit of the certificates for the others, if William was without notice of Mounce's lien, he is protected against it.

I am further requested by complainant's Counsel to charge you, "that an equitable mortgage created by a deposit of the title deeds to secure the payment of an antecedent debt, is not such a lien on the land as to overcome the vendor's lien for the purchase-money". I must decline so to charge. Although an equitable mortgage, created by a deposit of the title deeds to secure the payment of an antecedent debt, is not such a lien on the land as to overcome the vendor's lien for the purchase-money, yet if you believe that the security or indemnity taken by William Byars in this case, was taken pursuant to a previous agreement, that the security was to be indemnified against loss in standing security to Jones, William Byars stands on the same footing he would have done, if the indemnity had been given at the time of his becoming security for the Jones debt.

I am further requested by complainant's Counsel to charge you, "that when two parties, each, claim a lien upon an equitable interest in land, that no notice is necessary to enable the party having the first lien, in point of time, to enforce his lien. That William Byars took such an interest, and therefore is not protected, no notice to him having been necessary. I must decline to charge as requested, and refer you to what I have already said as being the law on this subject. I am further requested by complainant's Solicitor to charge, "that the deposit of the title deed to secure an antecedent debt, is a voluntary assignment, and the party securing them cannot be considered a *bona fide* purchaser, so as to defeat the complainant's right to his lien as vendor. I cannot so charge, but say again, that if, at the time William Byars stood security to Jones, his principal was to indemnify him by a mortgage, and did not do

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e, and afterwards made this deed and deposited these certificates, in lieu of the indemnity originally agreed on, the deposit of the certificates is not a voluntary assignment, nor is it void, but is founded on a good and sufficient consideration, and William Byars is entitled to notice.

Again, I have been requested by complainant's Solicitor to charge you, "that whatever facts or circumstances are sufficient to put a prudent man upon inquiry, as to the right or interest a man may have in an estate which he may propose to sell or mortgage, is considered to convey notice in Equity". I have already told you this is the Law.

After which the Court, at the request of complainant's Counsel, charged the Jury as follows; "the fact that James Byars promised to give a mortgage to Wm. Byars, on a negro woman, to indemnify him as his security on the Jones debt, and afterwards disposed of the negro in another way, is a new matter set up by defendant, and must be proved by other witnesses. Before the same is evidence to the Jury, the same not being responsive to the bill.

Before the conclusion of the charge, the Court was notified by complainants that they excepted to that part of the charge, in which the Court gives its opinion that certain facts, if proven, do not amount to notice; still, the Court refused to alter its charge.

After which the Jury retired and returned a verdict for defendants.

And the complainant excepted to said charge of the Court.

HAMMOND & HAMMOND; McCUNE, for plaintiffs in error.

FLOYD, for defendants.

By the Court.—STARNES, J. delivering the opinion.

[1.] We see no reason to interfere with the judgment of the Court below, on any point, except that made upon so much of the charge to the Jury as instructed them, that "if, when William Byars stood security for James it was agreed between

them, that James should secure his brother against loss, by a mortgage on a negro and failed; and if the security agreed on was not given, and afterwards William was secured by a deed to one of the lots, and by a deposit of the certificates for the balance—if William was without notice of Mounce's lien, he is protected against it"; and to so much of the charge in connection with this as instructed the Jury, that if James Byars had thus agreed with his brother William, to give him a mortgage on a negro, for the purpose specified, and failed to do so; and afterwards, "to indemnify or secure William Byars in standing his security, executed to him a deed to one of the lots, and delivered to him such evidence of title as he had received from Mounce, viz: the certificates of purchase; now if William Byars, at the time he took the deed and received the certificates, had no notice that the purchase-money, or a part of it owing to Mounce was unpaid, then William Byars is an equitable mortgagee and stands in the position of a purchaser for a valuable consideration without notice; and if he acted in good faith he is to be treated as a purchaser, in good faith, for a valuable consideration without notice, and is protected against complainant's lien".

In another portion of his charge, the Judge admitted, that "though an equitable mortgage, created by a deposit of title deeds to secure the payment of an antecedent debt is not such a lien on the land, as to overcome the vendor's lien for the purchase money;" yet, he proceeded to say again, that if there had been an agreement, at the time William Byars became security for his brother, that the latter would, for his protection, give him a mortgage on a negro, and James failed to do so; but afterwards, in lieu thereof, turned over to him these title deeds, as security against payment of the note, that in such case, "William Byars stands on the same footing as he would have done, if the indemnity had been given at the time of his becoming security".

From all of which instruction, it seems that the Court below considered the previous agreement between James and William Byars, in relation to the mortgage on a negro, as taking the

case out of the rule, which he had been asked to recognize, and placing the defendant, William Byars, in the situation of a *bona fide* purchaser for a valuable consideration.

[1.] The consideration for this equitable mortgage, it is said, will be found in the fact, that William Byars had become security for his brother, on a promissory note; that this deposit of title deeds was intended to protect him against the liability thus assumed, and that thereafter, he occupied, towards that brother, the relation of a purchaser without notice.

It seems that William Byars had become security for James, on this note, before the sale of the land in question to James, by the complainant; and no reference could have been had to it, as part of James' property, giving him responsibility and credit, when William became his security. This is not, therefore, a question between a creditor and the vendor's lien; and the rule that the vendor's secret lien shall not be set up to the exclusion of a *bona fide* creditor, so ably vindicated by Ch. J. Marshall, in *Bailey vs. Greenleaf*, (7 Wheat. 46,) and recognized by this Court, in *Webb vs. Robinson*, (14 Ga. R. 216,) is not here applicable. The rule does not even apply to a judgment creditor, who becomes so before the conveyance to the debtor; for each party, in that case, would have an equitable lien, and the maxim, *Qui prior est in tempore, potior est in jure*, would prevail, (*Finch vs. Winchelsea*, 1 P. Wm. 278. *Mackreth vs. Symmons*, 15 Ves. 354. *Bailey vs. Greenleaf*, 7 Wheat 56.)

[2.] His Honor, Judge STARKE, however, was of the opinion, that as James Byars had agreed to give his brother a mortgage upon a negro slave, to protect him, as security on the note, and failed to do so, but afterwards made this deposit in lieu thereof, William Byars was thereby placed in the position of a purchaser for a valuable consideration, without notice.

We cannot see, ourselves, what connection there was, under the circumstances, between the agreement to give a mortgage on a slave, supposing it to have been made, and the deposit of these title deeds as collateral security. It appears that the latter, by a totally independent and distinct understanding,

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without other advance or consideration, was substituted for the former, after the contract between the parties, that is to say, after William had become security for James; and that this collateral security consisted of property which was not owned by James, at the time his brother became security, and he agreed to give the first mortgage. If there had been anything like an understanding between the brothers, at that time, that James had the purchase of this land in prospect, that it was his intention to pay for it; and if he failed to give the mortgage on the slave, this deposit of title deeds should be made in its stead, then there would have been a connection between the two things; and it might, perhaps, have been said, that William was influenced in becoming his brother's security, by the consideration that the latter was to own this property; and he (William) should, therefore, be regarded in the light of a creditor with a lien upon this land. But there is no such evidence—nothing, in fact, to connect the deposit of these title deeds with the agreement between William and James Byars, at the time he became security, as to the protection of the former, because of his becoming security for the latter. And William Byars, therefore, appears here as a volunteer.

We are not sure, however, if it had been otherwise, even if William had become security for James, after the purchase of the land by the latter, that his lien would have been superior to the vendor's lien on the land; for it was only a contingent liability which he had assumed, and not an indebtedness. He might never have had to pay the note. Can he properly be said, then, to have occupied the relation of a creditor to his brother, on this account? At most, it would seem to have been only an equitable interest which he had in property of his brother, after becoming his security; and here, again, would apply the maxim, that of two equal equities, that is superior which is prior in point of time.

The view of the Court below, which we have been considering, proceeds upon the assumption, that James Byars had agreed to give a mortgage upon a slave to William, in consideration of the latter becoming his security. But we can find no

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such statement in the record, as it comes to us, except in the answer of William Byars; and the Court expressly charged the Jury, that the answer, on this point, was not responsive to the bill; and therefore, not evidence. If this be so, though the Court had been right as to the legal principle which he stated, he applied it to a hypothetical state of facts, not in evidence, and he was therefore in error.

On the whole, we think the Court erred in holding, that in this transaction, William Byars occupied the position of a purchaser without notice, for a valuable consideration, and that he stands on the same footing that he would have done, if this equitable mortgage had been given, at the time of his becoming security.

No. 50.—SIMEON SMITH, plaintiff in error, vs. GEORGE T. ROGERS, defendant in error.

- [1.] An insolvent debtor is not entitled to have as many as two watches exempt from sale. It is doubtful whether he is entitled to have even one.
[2.] Nor is he entitled to have exempt his wife's "implements or tools" of "trade or calling".

Ca. Sa. in Monroe Superior Court. Decision by Judge WARREN, February Term, 1854.

The defendant was arrested under a *ca. sa.* He filed his schedule, preparatory to taking the benefit of the Insolvent Debtor's Act. At the hearing he moved the Court to exempt from sale a silver watch, claiming the same as a part of his "wearing apparel"; also a piano and guitar, for the use of his wife, who was a "music teacher".

The Court refused the motion, upon the grounds—

1st: Because the wife had claimed and been allowed a gold watch.

2d. Because the defendant was a gunsmith and dentist; and as such, had been allowed the "implements of his trade". To which decision Counsel for defendant excepted.

HAMMOND, for plaintiff in error.

STUBBS & HILL, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The general rule is, that all of a man's estate, both real and personal, is subject to be sold under execution, for the payment of his debts. (*Jud. Act of 1799*, §31.)

The estate of the wife is the estate of the husband. This, too, is the general rule.

[1.] Various articles of property, however, have, from time to time, been exempted by the Legislature, from this liability. But among these articles is not to be found watches, unless they come under the head of "wearing apparel". It is doubtful whether they can be made to come under that head. If, however, they can, we think that not more than one can be made to do so. And one, and the best one, the Court allowed to be exempt in this case.

Nor are pianos and guitars to be found, by name, among the exempted articles. If, therefore, they are exempt, it must be because they are included in some of those which are named. It was insisted that they are included in the expressions—"common tools of his trade", "the working tools or implements of my trade or calling".

But that could not be so; for the debtor was not a music teacher, but was a gunsmith and dentist; and these are not the tools or implements of the trade or calling of a gunsmith or dentist.

[2.] It is true that his wife was a music teacher; but the Acts, none of them, exempt the tools or implements of the wife's trade or calling. They only exempt those of the debt-

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er's, himself. They, therefore, must be held still to remain governed by the general law. And that subjects them to sale for the husband's debts. (*Cobb's Dig.* 380, 384, et seq.)

No. 51.—GEORGE LYEN, plaintiff in error, vs. EDWARD HOWARD and others, defendants in error.

[1.] An equitable claim against the legatees of an estate, cannot be pleaded in defence of an action by the administrator *de bonis non, cum testamento, &c.* for a debt due to the estate. But upon a bill filed by the creditor against the legatees and the administrator, setting forth that the legatees reside in various States—that to sue them separately would entail such an amount of expense, &c. as would amount to the whole of his claim; that the debt was contracted with the estate upon the faith of this equitable claim; and that these legatees are the only parties in interest, there being no debts of the estate, a Court of Chancery will decree payment to the creditor, out of the debt due the estate.

[2.] Such a bill should not be dismissed because the wives of some of the legatees, daughters of the testator, and who might be entitled to an equitable settlement out of the legacy, were not made parties to the bill; and it was the duty of the Chancellor, in such case, to direct an amendment rather than turn the parties out of Court.

In Equity, in DeKalb Superior Court. *Dismissed.* Decided by Judge WARNER, August Adjourned Term, 1854.

This bill was filed by George Lyen against Edward Howard, administrator, with the will annexed, of Edward Howard, deceased, Joseph Wooten, Abraham Homeworth, Bennett Parish, John Parish, Sion Massey, Triglet Cannady, John Howard, Lemuel Dean, legatees under the will of the said Edward Howard, deceased, and Robert Jones, Deputy Sheriff of DeKalb County.

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The bill alleges, that in the year 1818, Edward Howard of Greenville District, South Carolina, departed this life, leaving a will, by which he bequeathed to his wife, Mary Howard, during her widowhood, a negro woman named Jinney, and her increase; and after "that", to be equally divided among his twelve children; that Mary and John Howard were appointed executor and executrix by said will; that in 1823 Mary removed from South Carolina to the County of DeKalb, and there the said Jinney bore a large family of children, up to the year 1838, when they had increased to the number of 14; that at that time, the said Mary Howard, having become very old and infirm, and blind, and unable to manage said negroes, and all the legatees of the said Edward Howard being of full age, (except a grand-child, who was represented by his guardian,) entered into an agreement, amongst themselves and the said Mary Howard, that the said negroes should be sold and divided among the legatees. The bill further states, that at this time, the said legatees were scattered over several States.

The bill further alleges, that the said Mary Howard executed, in 1838, a deed of relinquishment to the said negroes, in pursuance of said agreement, by which she gave up all of the said negroes, except a girl called Sally Ann, and a man named Lindsey, which she reserved for her use during her life; that the legatees reduced the agreement aforesaid, among themselves, to writing, by which the negroes were to be sold as aforesaid, and that the money arising from the sale of Lindsey, to-wit: one hundred dollars, should be set apart for the support of the said Mary Howard; that the said negroes were sold in March, 1838, thirteen in number, including Lindsey, by John Howard, as executor of Edward Howard, deceased, and who then lived in the State of Mississippi; that the money for which Lindsey sold was placed in the hands of Philip H. Worth, to be applied, by him, to the support of the said Mary Howard.

The bill further states, that in the year 1845, Mary Howard commenced to live with complainant, and continued so to do until September, 1847; that during that time, from her old

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age and afflictions, being blind and almost helpless, she gave a great deal of trouble, and required much care and attention; that her mind became so much impaired; the Inferior Court of DeKalb County declared her to be a person of unsound mind, and appointed complainant her guardian; that the woman Sally Ann, in the mean time, gave birth to several children—and was thereby unable to wait upon and take care of the said Mary Howard, and rendered her services valueless to complainant.

The bill further states, that after complainant was appointed guardian for the said Mary Howard, Philip Houseworth paid over to him the sum of \$575.00, it being part of the money arising from the sale of the negro Lindsey; that after the death of the said Mary Howard, complainant presented to the Court of Ordinary of said county, his account for the board and clothing, care and attention furnished and given to the said Mary Howard, and the said negro woman Sally Ann and her children; and the said Court allowed him the sum of \$542, for his said services and expenditures. The bill further alleges, that at the time Mary Howard came to live with complainant, she had no other means of support than the funds arising from the sale of Lindsey, and that complainant was induced to take her, from the fact that said fund was set apart by the said agreement, for her support and maintenance during her life.

The bill further states, that Edward Howard, after the death of the said Mary Howard, took out letters of administration, with the will annexed, on the estate of Edward Howard, deceased, from the Court of Ordinary of DeKalb County, and commenced an action against complainant, for the recovery of the said \$575; that complainant set up, as a defence to said suit, the said agreement between the legatees and the said Mary Howard, and the judgment of the Court of Ordinary allowing him the said \$575, for maintaining and supporting the said Mary Howard; that upon the first trial of said cause the defence of complainant was allowed by the Court; that on the appeal the Court sustained a motion to strike the plea of the complainant, and a verdict and judgment was rendered against

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him for the said \$576; that a *f. fa.* was issued from said judgment, and levied upon the property of complainant.

The bill further states, that the maintenance and support of the said Mary Howard and her negroes, by the complainant, was worth the said sum of Five Hundred and Forty-two Dollars; that the legatees under the will of the said Ed. Howard, reside in several States, to-wit: Georgia, Alabama, Mississippi, &c, and that if complainant be driven to sue each one separately, it will cost more than the amount of complainant's claim; and that there were neither debts or creditors of John Howard's estate.

The bill prays that defendants may come to an account with complainant, and that the said sum of \$542 be set off against the said judgment rendered against complainant, or that a new trial may be had, and that defendant, Edward Howard, administrator, may be restrained from proceeding with the said *f. fa.* To which is added a general prayer for relief.

To this bill a general demurrer was filed, which the Court sustained, and dismissed the bill. To which decision Counsel for complainant excepted.

EZZARD, for plaintiff in error.

CALHOUN, for defendant in error.

By the Court.—STARNES, J. delivering the opinion.

[1.] For the purposes of the demurrer, the allegations of this bill must be taken as true; and so receiving them, they present a very strong case for the interposition of a Court of Equity—one in which such a Court, only, can give adequate relief. They present a state of facts, of which the complainant could not have availed himself, in defence of the action instituted against him by the administrator; for his claim was not on the estate of John Howard, but was an equitable claim upon this fund, as against the legatees, by reason of their

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agreement; and no defence which he could have made to that action would, therefore, have afforded him protection. The Court below did right in rejecting it, in the Common Law action of the administrator against him. He should not, consequently, be prejudiced in his claim against these legatees, now asserted in Equity, by reason of the administrator's judgment against him, if he can show reasons why they should be made to account with him concerning it; and he does exhibit such reasons, if he show that these legatees have agreed that this fund should go to the support of Mrs. Howard, that there are no other persons interested in this estate, and that his bill for the support of Mrs. Howard is correct.

It is not a good objection, that the complainant has a remedy at Common Law. That remedy is not adequate, for the reasons assigned in the bill. He can only have complete protection, if his case be that which he has set forth by the aid of a Court which can hold back the hands of this administrator, until the legatees can be brought into account with the complainant—a Court having authority to bring all these parties before it, and thus save multiplicity of suits, and accumulation of expenses and costs.

[2.] Neither is it a good reason why this bill should have been dismissed, that the daughters of John Howard, and wives of some of these defendants, were not made parties to the bill, as being entitled to an equitable settlement out of this fund. 1. The amount coming to each of these eleven legatees, out of five hundred and forty-two dollars, is so small as to make it questionable whether or not it would be expedient to give direction to it as a settlement upon wife and children. 2. If these *femes covert* should have been made parties, it might have been done by amendment. It is, perhaps, advisable that they should be made parties; but this can and should be done by amendment; and the bill should not, on this account, be dismissed. There may have been no formal motion to amend, but the principles of substantial justice, and the practice in Courts of Chancery, authorize a Chancellor, under such circumstances, to di-

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rest an amendment rather than turn the parties out of Court.
(*Wade vs. Parker*, 2 *Keene*, 59. *Robert & Wife vs. West & Heid*; 15 *Gr.* 148.)

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT GAINESVILLE,

OCTOBER TERM, 1854.

Present: JOSEPH H. LUMPKIN,
 EBENEZER STARNES, } Judges
 HENRY L. BENNING,

No. 52.—LAWRENCE BROCK, plaintiff in error, vs. WILLIAM GARRETT, trustee, &c. defendants in error.

[1.] It is to be presumed, that by the law of Alabama, a purchaser under a judgment of that State, and purchasing in that State, acquires all the title which the defendant in the judgment had.

[2.] As a general rule, a judgment is evidence as between the parties to it and their privies.

[3.] A verdict, if against law, ought not to be allowed to stand.

Trover, in Floyd Superior Court. Tried before Judge JOHN H. LUMPKIN, March Term, 1853. Motion for new trial. Decided at May Term, 1854.

This was an action of Trover, brought by William Garrett, his trustee for Mrs. Arianna Washington, against Lawrence Brock, for selling slaves. The plaintiff below claimed credit

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a deed executed in 1816, in King George County, Virginia, by Warner Washington and Arianna, Washington, his wife, whereby, in consideration of six shillings, they granted and conveyed unto Needham L. Washington sundry slaves and other property, together with certain funds and property in expectancy, "To have and to hold the aforesaid negroes and other property herein conveyed by the said Warner, as well as all the right and title of, in and to all other property, properties, estate or estates, which they, the said Warner and Arianna now are or hereafter may be entitled to, either by inheritance, in right of her the said Arianna, or otherwise, and also herein jointly conveyed by the said Warner and Arianna, unto the said Needham L. Washington, his heirs, executors and administrators—shall and will stand possessed of the said property granted, bargained and sold, as well as of the land and improvements, &c. &c. to the uses and purposes hereinafter expressed and no other. First. To the use of the said Warner and the said Arianna, his wife, during their joint lives, to pay over to them the profits thereof. Secondly. To the use of the longest liver for his or her life. Thirdly. To the use of Frances Whiting Washington, John Stith Washington and Harriet Ann Washington, children of the said Warner and Arianna, and any other child or children that the said Warner and Arianna may hereafter have of their bodies: in either case, to pay over to them the profits of the aforesaid estate. Fourthly. That the said Warner shall have the right and the power, at his death, to appoint and direct by will, deed or otherwise, in what manner the aforesaid property and estate, as well as the right to the increased part of the expectations by his wife Arianna, at the death of her mother, provided it be not gotten before his, the said Warner's death, and every other right in inheritance whatever, to which he the said Warner and the said Arianna, or either of them, may now or hereafter be entitled, shall be disposed of and distributed amongst his aforesaid several children, by his said wife Arianna, and no others; and also at the same time, to order and direct when this trust shall finally cease and expire. And lastly—in case the said Warner

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shall fail or neglect, from any cause whatever, to appoint or direct as aforesaid, by deed, will or otherwise, in what manner the aforesaid property and estate, as well as the increased part of the expectation, by his said wife Arianna, at her mother's death aforesaid; together with any other right or title, to which he, the said Warner and the said Arianna, or either of them, may be entitled, either by inheritance or otherwise, shall be disposed of and distributed amongst his aforesaid several children; that in that event it be understood hereby that his, the aforesaid several children, shall divide the same as they will be thereto entitled by virtue of the Statute of Distribution of the estates of intestates, and that this trust shall finally cease and expire, when the youngest of the aforesaid children shall arrive to lawful age; provided, the said Warner shall die before that time. And the said Needham L. for himself, &c. covenanted to stand possessed of the said property, for the uses and purposes aforesaid, and no other," &c.

This deed was proven and recorded in King George County, and was thence certified to Frederick Co. to be there recorded.

Subsequently, upon a bill filed, to which this deed was attached as an exhibit, Needham L. Washington was removed from his trust, by the Chancery Court of Fredericksburg District, and William Garrett appointed trustee in his stead. An exemplification of the record of this bill and exhibits, and decree, certified by the Clerk of the Superior Court of Spotsylvania County, Virginia, and by the Judge of that Court, was admitted in evidence by the Court, on the trial.

A record was offered and admitted in evidence of a bill filed by Mrs. Washington, in the Chancery Court for the Northern Division of Alabama, which was sanctioned by the Chancellor, on condition that bond and security should be given, which it appeared never was given. The bill set out a claim cause pending in Alabama, and Mrs. Washington's rights under the trust deed above set forth.

The defendant claimed under a Sheriff's deed, made in pursuance of a sale by the Sheriff in Alabama. From the record

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of a claim cause in said State, it appeared that an execution against Warner Washington, was levied on the negroes in dispute, in 1841; that William Garrett interposed a claim thereto, and in his affidavit of claim, stated that they were "held by him as trustee, for the use of Arianna Washington, who has the beneficial interest in the same, by virtue of a deed of trust made and executed the 14th day of January A. D. 1840". It also appeared that in making up the issue, the claimant stated, "that the negroes in controversy are not the property of Warner Washington, but that he holds the same as trustee for the use of A. Washington, under a deed made in the State of Virginia, on the 1st day of December 1816". The Jury found the property subject to the execution, and set out in their verdict the value of each negro, being the market value at that time. Under this finding, the negroes were sold and the defendant became the purchaser.

The depositions of Messrs. Walker and Martin, the Attorneys on each side of this claim cause, were offered and admitted in evidence, for the purpose of showing that the rights of Mrs. A. Washington were not passed upon at the trial of that issue. They did not fully agree—one sustaining this view, and the other inclining to the opposite conclusion.

Warner Washington died in the year 1840. The only testimony offered, of the value of the negroes, was the opinion of one witness, as to their value in 1841.

The motion for a new trial was made on various grounds; and being refused by the Court, error is assigned, as follows—

1st. Error in the Court in refusing to charge, "that if the Jury find, from the evidence, that the negroes in dispute were levied on and claimed by the present plaintiff, as trustee for Arianna Washington, and the negroes were found subject to the execution on the trial of the claim, and were sold afterwards to satisfy said execution, and Brock purchased them at Sheriff's sale, then the judgment subjecting the property to the payment of the execution, is a bar to the plaintiff's right of recovery, in this action, and the Jury must find for the defendant.

2d. In refusing to charge, that a party to a judgment cannot attack it in any other cause, collaterally; but the judgment is conclusive against him, until reversed, and if the plaintiff could have sustained his claim and failed to do so, he cannot now show the negroes not subject to the execution.

3d. In charging that the judgment in the claim case in Alabama, which was pleaded in bar of this case, is not a bar to the plaintiff's right to recover.

4th. In charging, that if the claim case in Alabama was tried on its merits, then the judgment in that case was a bar to this action: but if it was not tried on its merits, of which the Jury were to determine from the evidence, then it was no bar to this action.

5th. In charging, that a judgment and execution binds no property, except that of the defendant *in fa.* and that the Sheriff could not sell, and convey any interest, except that of the defendant *in fa.*

6th. In charging, that if the Jury believed, from the evidence, that Warner Washington had only a life estate in the property sold, the purchaser took nothing more.

7th. In admitting in evidence a copy of the trust deed, without its being certified as required by law, and without proof of the execution of the original.

8th. In admitting in evidence the original bill in Equity, filed by Mrs. Washington in Alabama.

9th. In admitting in evidence, the depositions of Martin and Walker.

10th. In admitting the proof of the value of the negroes, in 1841.

11th. In refusing to grant a new trial, on the ground that the verdict was contrary to the charge of the Court—the Court having charged that if the defendant had the negroes more than four years in his possession, before the commencement of the suit, under a purchase at Sheriff's sale, then the Statute of Limitations would bar the plaintiff's right to recover.

12th. In refusing a new trial, on the ground that there was

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no evidence to support the verdict, for the amount found as the value of the negroes and their hire.

AKIN and COBB, for plaintiff in error.

ALEXANDER & UNDERWOOD, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Whatever title Brock had, he derived from the law of Alabama. He bought the negroes in Alabama, under a judgment of a Court of Alabama. That judgment was one in which the Branch of the Bank of the State of Alabama, at Huntsville, was plaintiff, and Garrett was claimant; and Warner Washington was one of the defendants in the *fi. fa.* which gave rise to the claim.

[1.] By the law of Alabama, as it is to be presumed, a purchaser under a judgment, purchases and acquires all the title which the defendant in the judgment had. This is a general principle—common, probably, to every system of Law. If the judgment be a judgment of condemnation in a claim case, the purchaser, it is to be also presumed, acquires not only all the title which the defendant in judgment had, but also all the title which the claimant had, which he could have asserted by the claim. This title of the claimant's the purchaser acquires by virtue of the doctrine of estoppel. The claimant being a party to the judgment, is to be considered, after the judgment, estopped from saying that he has a title which he could, by asserting, have made the means of preventing the judgment.

Whether, however, this doctrine of estoppel applies to a case in which the claimant is but a trustee, is a question which, though involved in this case, it is not necessary to decide; for whether it does or does not, the judgment of this Court, under the peculiar facts of the case, would be the same. This will be seen.

And by the law of Alabama, the interest which Warner Washington, the defendant in the judgment, had in the ne-

groes, was that of an estate for, his life, and no longer. This appears, by a decision of the Supreme Court of that State, made upon a deed similar to this deed of 1816, executed by Warner Washington. The decision is that made in the case of *The Branch Bank at Montgomery vs. Wilkins*, (7 Ala. N. S. 589.)

This interest, then, was that which was bound by the judgment; and being an interest to endure for the life of the defendant in judgment, Warner Washington, it was such an one as to be paramount to any right at that time assertible by Garrett, the trustee; that is to say, Warner Washington's interest was such as to make it impossible that Garrett could have any interest, which he could assert against it by a claim. If Warner Washington had the whole life estate, there was no estate left which Garrett could have, except that which might remain after Warner's death.

If we admit, therefore, that Garrett, although but a trustee, was, by the judgment, estopped from asserting any title which he might have asserted in the case, which resulted in the judgment, we admit what amounts to nothing; for when the case was tried, he had no title which he could assert on the trial. And, indeed, if he had a title which he might have asserted, but did not assert, his being estopped, as to that title, would not estop him from asserting another title, which he could not, until afterwards, assert.

It follows that all the interest which Brock acquired by his purchase, was the interest which Warner Washington had, which was an interest but for the life of him, Warner; and that he acquired no interest or title, by means of estoppel, from Garrett.

So much for Brock's title.

What was Garrett's? The remainder in the negroes, after the expiration of the estate for the life of Warner Washington. This was a title which Garrett could not have asserted on the trial of the claim, for this title did not then exist; at least, did not exist, except as one to be asserted in the future.

To this title of Garrett's, the plea of the judgment in Alabama, was therefore manifestly no bar.

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It was no error, therefore, in the Court below, not to give the charges which it was requested to give, or to give the charge, that the judgment in Alabama was not a bar to the suit. It was an error, indeed, to charge that the judgment in Alabama, if in a case tried on *the merits*, was a bar, but an error against the defendant in error, not against the plaintiff; for even if the judgment was in a case which had been tried on its merits, it could be no bar to any title which did not exist in a form to be asserted at the time of the trial which resulted in the judgment.

So, although it may be true, as a general rule, that the purchaser, under a judgment rendered in a claim case, acquires not only such title as the defendant had, but also such as the claimant had; yet, as in this case, the claimant was a trustee, and there is some doubt as to whether the doctrine of estoppel applies to trustees; and as the claimant had, in fact, no title at the time of the trial, which he could assert, and therefore, as to which he could be estopped; and so, had no title which the purchaser could acquire; and as we grant a new trial on other grounds in the case, we do not choose to say that the Court erred in charging, that the purchaser under a judgment which was a judgment in a claim case, gets no title except that of the defendant in the judgment. We prefer not to express an opinion on this point.

So, of course, it was no error to charge, that if Warner Washington had only a life estate in the property, the purchaser took nothing more.

[2.] The exemplification of the judgment rendered in the Court in Virginia, was not proper evidence for proving the trust deed. Brock was no party to that judgment; therefore, it did not bind him. The Court, therefore, should not have allowed the exemplification to be used for *that purpose*.

Considering, however, that Garrett derives his whole power, as trustee, from this judgment, I have, myself, very great doubt whether the judgment is not good evidence for him to prove every thing relating to his title, including the existence of the trust deed. But if the deed could be produced, or if witnesses

to its existence could be brought forward, proof of the deed, in either of those ways, would at least be more satisfactory. See *Greentf. Ev.* §527.

[3.] John Stith Washington proved what was the value of the negroes in 1841. The trial was in 1853. The conversion, which dated from the death of Warner Washington, some time in 1849. What was proved then was the value of the negroes, at from eight to twelve years before the time at which the value was assessed by the Jury. Is it reasonable to presume that the negroes remained of the same value so long—that they had not, towards the latter part of the period, some of them, more or less, depreciated in value? We think not. Unless, therefore, the plaintiff in the suit had shown this to be the best or only evidence in his power, we think it ought not to have been received.

[3.] The verdict being founded, as to the value of the negroes, on this testimony of John Stith Washington; and being also, in part, rendered for half the hire of the negroes from 1845—four years before the plaintiff's title to sue accrued, of course was such as ought not to have been allowed to stand.

The admission of the original bill in Equity, from Alabama, and the depositions of Walker, and those of Martin, was, as far as we can see, the admission of what was merely irrelevant.

On the whole, the Court should have granted a new trial—placing it on the grounds above indicated; and therefore, this Court grants one, on those grounds.

As to the Statute of Limitations, that could not commence to run against Garrett, the trustee, until the termination of the life estate which preceded his—i. e. until the death of Warner Washington. And the charge of the Court to the contrary was, itself, wrong; and if wrong, it was no error in the Jury not to follow it. Their finding contrary to this charge, then, is not a ground for a new trial. On the motion for the new trial, the Court, itself, became conscious of its error, and admitted it.

Cleland et al. vs. Waters et al. executors, &c.

No. 53.—**W. C. CLELAND** and others, plaintiffs in error, vs. **THOMAS J. WATERS** and others, executors, &c. defendants in error.

[1.] When a testator, after naming sundry slaves, male and female, adds, "on account of the faithful services of my body servant, William, (the husband of Peggy,) I will and desire his emancipation or freedom, with the future issue and increase of all the females mentioned in this item of my will. If it is incompatible with the humanity, &c. of the authorities of the State of Georgia, I direct my qualified executors to send the *said slaves* out of the State of Georgia, to such place as they may select; and that their expenses to such place be paid by my executors out of my estate, and the whole proceedings be conducted according to the laws and decisions of the State of Georgia, I having no desire or intention to violate the spirit, or intention, or policy of such laws". Further—"I desire that the said slaves, if compelled, may select their residence out of the State of Georgia, and in any part of the world". The will directing the forfeiture of the interest of any legatee who resists this item: *Held*, that the intention of the testator was, to manumit *all* the slaves mentioned in that item of his will.

[2.] Where a will is absurd or ambiguous, as it stands, the Court may supply words to carry into effect the intention of the testator, when that intention is clearly manifested.

[3.] The manumission of slaves, to be sent out of the State, *it would seem*, is not in conflict with the public policy of the laws of Georgia.

In Equity, in Gwinnett Superior Court. Decision on demurrer, by Judge JACKSON, March Term, 1854.

Thomas J. Waters departed this life testate. The following is a copy of his will; excepting the 1st and 2d items.

"*Thirdly.* Whereas, I own and hold in possession, the undernamed slaves, to-wit: Rory, Queen, his wife, her children, William and Rose, Mary's brothers, Pompey and Tom, Mary's sister Caroline, and Caroline's daughter, Dinah, (with the exception of Pompey, the above people are at present in Bryan County, in this State). Also, the following slaves in Gwinnett County, State aforesaid, to-wit: Polly, her children, James, Morgan, (James and Morgan at present not in Gwinnett County,) Jefferson, Cherokee, John, Elizabeth, boy Swimmer, George, girl Polly, Peggy, sister to Polly, her children, Charles,

bowling, Betsey, Betsey's children, young Peggy, Catherine, Willey, Georgia, Thomas, infant girl, Josephine, Jenny, sister to Betsey, Jenny's children, to-wit: Sarah, Harriet, Hughes, Henry Clay and infant boy, Clark, Lydia, sister to Jenny, Lydia's children, Hannah, Jesse and infant boy, Susan *alias* Sukey, sister to Lydia, Sucky, infant girl, Caroline, Prudence, sister to Peggy, and Polly, Prudence's daughter, Cynthia. On account of the faithful services of my body servant, William (the husband of Peggy) I will and desire his emancipation or freedom, with the future issue and increase of all the females mentioned in this item of my will. If it is incompatible with the humanity, &c. of the authorities of the State of Georgia, I direct my qualified executors to send the said slaves out of the State of Georgia, to such place as they may select; and that their expenses to such place shall be paid by my executors, out of my estate; and that the whole of this proceeding be conducted according to the laws and decisions of the State of Georgia, [having no desire or intention to violate the spirit, or intention, or policy of such laws; and I do further direct, that if any person to whom any bequeath or disposition contained in this item offer any impediment to its being *carried into execution*, he or she shall, in no event, receive any part of my said estate; but my executors are enjoined to withhold from the person so opposing, any share or portion herein devised and bequeathed to him or her, and to distribute the share so forfeited among my other heirs, *per stirpes*, and not *per capita*. I desire that the said slaves, if compelled, may select their residence out of the State of Georgia, and in any part of the world".

Fourth. (Made a specific bequest to his executors in trust for two grand-daughters.)

Fifth. I give and bequeath to my qualified executors, all the rest and residue of my estate, both real and personal, and choses in action, in trust, that they will hold the same together, without any distribution, until all my directions, contained in the third item of this my will, shall have been fully, in all res-

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pects, complied with; and so soon as that has been done, (and not before on any pretence) I direct that they shall divide my estate, real and personal, into three equal parts or shares; and I give, devise and bequeath one share or equal part thereof to my son Thomas J. Waters, his heirs, executors, administrators, and assigns, forever.

Sixth. I direct my qualified executors to hold, with the exception of one Thousand Dollars, exclusive of interest, say out my daughter, Williamina C. Cleland's share or portion of my real and personal estate, to be paid over to my son Thomas J. Waters, his heirs and assigns, trustee to my daughter Williamina C. Cleland and children, being amount of my note dated 25th July, 1840, and made payable to Thomas J. Waters, trustee, &c. This disposition and arrangement is in justice to Thomas J. Waters, and for his security, &c. During my life, I have given to my daughter, Williamina C. Cleland, and to her children, considerably more than this amount—more so than I have given to any of my other children. I wish it, however, to be distinctly understood, that my son Thomas J. Waters, his heirs and assigns, is to pay, as trustee as aforesaid, the above amount of One Thousand Dollars, exclusive of interest thereon, to his sister Williamina C. Cleland and children, out of his own individual resources or means—the amount is not to be considered (as he receives an equivalent or the same amount from his sister Williamina C. Cleland's share or portion from my estate,) a debt against my estate, or to be drawn from my real or personal estate, whatever. Nor is it to militate or take from one particle to the carrying out, by my qualified executors, the third item of this my will and testament. (The remainder of this clause and the *seventh* item gave the other two-thirds of his estate to his two daughters and their children.)

Eighth. And I direct my qualified executors, in the division of my negroes among my children, to divide the said negroes in families, so that the principles of humanity may be observed, and the separation from each other be as free from pain as possible. I also hope and pray (out of respect to my memory)

that the division of my estate be without wrangling or litigation, &c''.

The last item appointed executors.

The testator possessed a large estate, including a large number of negroes not mentioned in the third item of his will. A number of those mentioned were lineal descendants of testator. The others were of the same families. A portion of these negroes were in the possession of Thomas J. Waters, the son, by his father's consent, at the time of his death. Testator's children were all of middle age, and had been provided for by him.

To a bill filed by the executors for construction of the third item of this will, a demurrer was filed. The Court below overruled the demurrer, holding that the negroes therein enumerated, were all emancipated.

This decision is assigned as error.

MCDONALD; COBB & HULL, for plaintiff in error.

HUTCHINS; T. R. R. COBB, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

The demurrer in this case was special, viz: that the third item of the will of George M. Waters did not emancipate the negroes therein named, except William, the body servant of the testator, and the future increase of the female slaves mentioned. The question was not made in the Court below, and was expressly waived in the argument in this Court, as to the legality of such emancipation; and we are called on simply to determine what is the true construction of this will, as to the slaves in controversy.

The first object of a Court in construing a will, should be to discover, if possible, the intention of the testator, and to give it effect, if it be legal; or, to vary the phraseology, effect should be given to the intention, whenever it is not contrary to law, and can be indubitably ascertained by permitted legal means.

In the pithy but somewhat quaint words of *Swinburne* (*Trea-*

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tise on Wills, 1 vol. 19)—“The will or meaning of the testator is the queen or empress of the testament: because the *will* doth rule or govern the testament, enlarge and restrain the testament, and in every respect moderate and direct the same; and is, indeed, the very efficient cause thereof. The will, therefore, remaining of the testator, ought, before all things, to be sought for diligently; and being found, ought, in any wise, to be observed faithfully. It ought to be sought for as earnestly as the hunter seeketh his game; and as to the sacred anchor ought the Judge to cleave unto it, pondering not the *words*, but the *meaning* of the testator. For although no man be presumed to think otherwise than as he speaketh, (for the tongue is the utterer or interpreter of the heart,) yet cannot every man utter all that he thinketh; *and therefore, are his words subject to his meaning*. And as the mind is before the voice, (for we conceive before we speak,) so it is of greater power; for the voice is to the mind, as the servant is to his lord”.

What, then, was the intention of the testator, as to the negroes named in the third item of this will? The plaintiffs in error insist that it was to manumit his faithful body servant, William, and the future increase of the female slaves. And the argument urged with much apparent earnestness is, that the testator, having confidence that his own children would deal kindly with the rest of the slaves mentioned in the third item, was willing to leave them in slavery: but that in the course of nature, these, his immediate offspring, could not live long enough to see to the kind treatment of the issue of these slaves; and hence, his desire to emancipate the issue. And we have been urged to give this exposition of his intention, because it is most consistent with the verbal, grammatical interpretation of the instrument, as it stands, without resorting to extraneous circumstances, or to the necessity of supplying words, as omissions by the draughtsman—in this case, the testator himself.

Can such an intention be imputed to the testator? We cannot bring ourselves to this conclusion. Various considerations force us to repudiate this conclusion. We will advert to a few of them.

And first. The eighth item of this will manifests a great anxiety upon the mind of the testator, that the principles of humanity should be regarded in the division of his slaves—so that “families should not be divided, and the separation from each other be as free from pain as possible”. Can it be consistent with this idea, that the testator should have intended to have the tender infants, the issue of these, evidently, his favorite servants, torn from their parents immediately upon their birth, and if refused an abiding place here, transported to some distant land? For it is to be remarked, that the will makes no provision for the maintenance of the future increase, until they shall have arrived at the years of discretion. The owners of their parents could hardly be expected to rear them without adequate compensation, and to deliver them up, to go free, so soon as they should be capable of rendering service.

So that, under this view, the intention of the testator must be held to have been, to disregard every principle of humanity—to outrage the holiest feelings of our nature, by the disruption of those very ties which he was so solicitous to preserve—to separate mothers from their minor children, and to send the latter off without the means of support; and that, too, in the face of his solemn declaration, that the very contrary of all this was his wish and will.

But this is not all. William, his favorite slave, the only one *in esse*, whom, according to this view, he was unwilling to trust even in the hands and keeping of his family, must be separated from his aged wife and their numerous offspring, including the second, and perhaps third generation, and be sent off, “solitary and alone”, to enjoy the fatal boon of liberty—by far too dearly purchased, as to him—leaving there his household—wife, children and grand-children, to continue in slavery! No other family of his negroes must be divided—humanity forbids this—but as a reward for William’s fidelity, this aged domestic must be torn from home and kindred, and sent back to the land of his fathers!

This consideration, alone, would convince us that such was not the intention of the testator.

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There is another aspect in which this intention would be equally unreasonable. Many of these slaves, it is admitted, are the lineal descendants of the testator—"bone of his bone and flesh of his flesh". Is it natural that his bounty and benevolence should have overlooked these, so near of blood to him, to expend itself upon issue hereafter to be born—begotten by strangers?

Again, his children, the legatees in his will, are men and women of middle age. Many of the slaves mentioned in the third item, are infants. It is not probable—hardly possible—that these legatees should live to see the last issue born of these infants, and thus, to effectuate the benevolent purpose of the testator. However willing, therefore, Mr. Waters may have been to trust his favorite servants to the justice and generosity of his legatees, he must have foreseen that they could not, in the course of nature, survive long enough to extend and guarantee this kind treatment, through the distant future, to these people.

Further: Not only is this view unreasonable, because unnatural and ineffectual, but it is wholly impracticable. The entire estate of the testator is to remain in the hands of the executor, "without any distribution, until all the directions contained in the third item of the will shall have been fully, and in all respects, complied with. And so soon as that has been done, *and not before, on any pretence*, a division is directed". For seventy or eighty years, then, this estate is to remain undistributed. The legatees, his children, will, in all human probability, be dead, before enjoying any portion of his bounty. And the executor, *charged with the personal execution of this trust*, will have departed this life long before the time for its final consummation shall have arrived.

We are not forgetful of the verbal criticism of one of the learned and distinguished Counsel for the plaintiffs in error, upon the words "complied with", nor of his authority, (*Johnson's Dictionary*,) to show their meaning—"To acquiesce in; to be obsequious". And his deduction, that so soon as the le-

gatees shall have signified their assent to this disposition of the will, the time contemplated for a division would have arrived.

We would simply remark, that other Lexicographers, and Mr. Webster among the rest, give other definitions, such as to fulfil; to perfect or carry into effect; to complete; to perform or execute. And that these are not only the common and well known signification of the phrase, but that, in fact, in the 3d item of the will, the testator explains his own understanding of the term, by using as a synonym, "*carried into execution*".

If a Court of Equity were called upon to frame, by its decree, directions and instructions to the executor, for carrying into effect such intention as that imputed to the testator, could they be drawn? This issue and increase are to select their future home. To do this they must first arrive at years of discretion. No provision is made for their maintenance, in the meantime. Must each one be sent off separately, as they severally arrive at such years of discretion? During this long interval, what must become of the estate? These and many similar inquiries, present so many and such momentous difficulties, that the Court, rather than attempt its execution, would most probably declare the will void *pro tanto*, for uncertainty. Ought such an intention to be needlessly ascribed to the testator, seeing that it would lead to such consequences?

Another consideration, going to show that the construction I am combating is not admissible, is the recital, in the 3d item, of the names of many male slaves. Was this a mere act of supererogation? Had Mr. Waters no practical object to be accomplished by it? It is suggested, and likely with truth, that the names of the female slaves were set forth for the purpose of identification, and to determine whose issue should be free. But why specify the males? The answer to this question in the argument was, to assist in identifying the females. But this could not be, for in some cases, the males are identified by reference to the females. Thus: "Mary's brothers, Pompey and Tom". There must have been, then, another motive; and it is made our duty, in construing all instruments, whether public or private, statutes or deeds and wills—to give

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effect to every part—every word—*ut res magis valeat quam pereat*.

Another view, fatal to the construction contended for, is derived from that clause in the 3d item, directing the executors to send “said slaves” out of the State, in a certain event. What *slaves*? There is but one, according to the position occupied by Counsel for plaintiffs in error, and that is William, the body servant. The issue are not in *esse*; and consequently, cannot properly be spoken of as “said slaves”: and if in *esse*, they would not be slaves, because, being manumitted prior to birth, they would be born *free*.

We have occupied much more space than we intended, to rebut the idea, that such was the intention of the testator. There are still behind, other views confirmatory of those already advanced, that the Attorneys of the plaintiffs have not correctly expounded the will of Mr. Waters, as to what was his intention respecting the slaves designated in the 3d item of that instrument, as to be collected from the will itself. We are satisfied, beyond a doubt, that it was the purpose of the testator to emancipate *all* the slaves embraced in this clause. The most casual reading of the whole paper would impress that opinion upon any unbiassed mind; and a more careful examination of each item serves only to strengthen this conviction. The testator’s anxiety seems to have been so great upon this point, that it stands forth prominently, even in other parts of the will unconnected with it. It is affixed as a condition precedent to every legacy, save that embraced in the 4th item: That this darling object is to be first effected; and any legatee throwing obstructions in the way, is made to forfeit all interest under the will. The fact extraneous to the will of the blood relationship of a large number of these negroes to the testator, would remove the last particle of doubt, did any remain upon our mind.

The next and more difficult question is, does the will sufficiently express the intention of the maker, to enable a Court to decree its execution? Or is it necessary to supply words for that purpose?

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My brethren are not entirely clear upon this point. For myself, I incline strongly to the belief that it is. The whole testament bears upon its face evidence of an unskilful scrivener; yet, while extremely ineptistic, as a whole, there are technical terms used, which indicate, infallibly, a lawyer's handiwork. The presumption is, that this will was copied from another, and that the attempt was made to modify the provisions of the former; that the first was the work of a skilful, the last of an unskilful hand. There is evidently something omitted in the third item, arising, probably, from the long enumeration of the negroes' names. Still, I am inclined to think there is enough left to effectuate the intention of the testator. That purpose we have arrived at, viz: Manumission.

It is proper to premise, that no form of words is necessary to do this. There is no potent word, such as "*dede*" in a deed, or "*heirs*" in an estate of fee simple, at Common Law, necessary to accomplish this object. Slavery is the dominion of the master over the slave—the entire subjection of one person to the will of another. Manumission is the withdrawal or renunciation of that dominion. Whatever, therefore, indicates such withdrawal or renunciation, whether expressly or impliedly, effectuates manumission. Hence, we find in every nation where slavery has existed, implied as well as express manumission. The making of a deed to a villein—the bringing of a suit or complaint against him, says *Blackstone*, manumitted him by implication: Because the Lord, by dealing with him as a freeman, thereby admitted that he ceased to be a slave. Before the introduction of deeds into common use, various simple but significant modes of express manumission were adopted by the various countries holding slaves, each of them indicating the withdrawal of dominion by the master.

In the case of *Bryan vs. Walton*, (14 Ga. R. 185,) I had occasion to refer to some of the modes in common use among the Romans. One method among the Germans was termed manumission *per quartuor vias*; and consisted simply in leading the slave to a place where two roads crossed; and in a set

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phrase, giving him the liberty of choosing his own route. (See *Heinecke's Opera*, Tom. 8, p. 20 to 25 inclusive; and *Poigles versus De State. Survivor*, 490, for the numerous modes which were practised for manumitting slaves.)

Are there not words, then, in this will, indicating the desire of the testator, to renounce his dominion over these slaves? After naming them he adds—"on account of the faithful services of my body servant, William, (the husband of Peggy,) I will and desire his emancipation or freedom, with the future issue and increase of all the females mentioned in this item of my will. If it is incompatible with the humanity, &c. of the authorities of the State of Georgia, I direct my qualified executors to send the *said slaves* out of the State of Georgia, to such place as they may select," &c.

Who are the *said slaves*? We are told, that by the rules of strict grammatical construction, these words refer to their immediate antecedents, viz: William and the future issue. And we have remarked, that that antecedent has not the proper requisites to satisfy the plural, "*slaves*". William is a single slave. The issue are not *in esse*, and when born, are not slaves: because manumitted and born free. Moreover, this issue cannot satisfy the other description, viz: persons of discretion, capable of selecting a destination. Besides, in carrying into effect the intention of a testator, Courts will disregard strict grammatical construction, and will, if necessary, transpose words or even portions of a sentence. (*1 Jarman on Wills*, 437, and authorities there cited. *Covenhoven vs. Skeller*, 2 *Paige*, 122.)

Our opinion is, therefore, that the "*said slaves*" are, *ex vi termini*, all the slaves mentioned in the previous part of the 3d item. And this opinion is confirmed by the last clause in this item, where the testator repeats—"I desire that the '*said slaves*' if compelled, may select their residence out of the State of Georgia, and in any part of the world". The same words evidently have the same meaning, when used in different places in the will, and refer, obviously, to adults who are capable of choosing. And William, his body servant, being the only

are answering to this description, except those named in the 3d item, the necessary conclusion is, that they are embraced in this term.

But if we are wrong in this, would not the Court supply the necessary words to effectuate the intention of the testator? It is not denied that the Court has the authority to do so in certain cases. It is insisted, however, in the argument, that this is not one of them; and numerous and satisfactory authorities have been adduced, to show that however fully persuaded the Court may be, as to the intention of the testator, words will never be supplied, where the will, as it stands, makes a clear and complete disposition of the property.

The true rule, we apprehend, upon this subject, is laid down by Mr. Williams, (*Treatise on Ex'rs*, vol. 1, p. 299,) which is this: That to authorize the addition of words in a will, two conditions must intervene, viz: 1st. Some ambiguity or absurdity, on the face of the will, ascribable to something omitted; and, 2dly. Manifest and convincing proof that the omission was contrary to the intention of the testator. This rule in no wise conflicts with the plaintiff's authorities.

The 2d condition in the rule is answered fully, we conceive, and have endeavored to show, by the provisions of the will itself. Is there, then, any uncertainty or absurdity on the face of the instrument? If the words, "said slaves", do not refer to the slaves mentioned in the 3d item, how account for the folly of mentioning a large number of slaves, and with such particularity, especially as it respects the males or a portion of them, without object, unless to make disposition of them?

The name of a legatee is wanting, which makes this case very similar to that of the *Lessee of Waltham vs. Turner*, (2 Dowl. & R. 398.) There the will was in these words: "I give unto H W a messuage or tenement, now in the possession of W. Item. I give further unto my nephew, H W, half part of my garden and £100 stock in the 4 per cent. Bank annuities. I give, further, my said stables, cow-house and all other out-houses in the said yard—my sister M W to have the interest and profits during her life". The Court supplied the

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words, "to him" in the last clause. For numerous other cases to this point, see 1 *Jarman on Wills*, ch. XVI.

Again, the 3d item says: "If it is incompatible with the humanity, &c. of the authorities of the State of Georgia, I direct," &c. If what is incompatible? The sentence is unquestionably unfinished. It is meaningless, as it now stands. After "the State of Georgia", insert the words, to free the said or above named slaves, and you give sense and completeness to the passage. I venture the prediction, that if the original of this testament is ever found, or the notes of instruction by which it was written, these or similar words will be found in it, at this place.

So that, were it necessary so to decide, we would supply the proper words, rather than that the will of the testator should miscarry.

Another view of the 3d item has occurred to us. Admitting the testator's intention to manumit, in Georgia, was limited to William and the future issue of the females. In the event of this design being incompatible with the humanity, &c. of the authorities of the State, then all of the said slaves are to be sent out of the State; or in other words, as if he should have said, "I manumit William and the future issue of the females, and wish the others to remain slaves, if William and the issue can remain in this State, convenient to the others. But if this cannot be done, then I desire all of them to be sent together, to some foreign State, to be selected by them".

This construction is equally liberal with that contended for by the plaintiffs, and to my mind, much more plausible; still, candor constrains me to say, that my opinion is, that it was the intention of the testator to manumit all the slaves included in the 3d item, in any event.

We have been strongly urged in construing this will, to lean to that interpretation most unfavorable to manumission, on the ground that the favor shown to liberty by the Common Law, (1 *Coke Litt.* 124, b) or as *Fortescue* hath it, *Anglicæ jura in omni casu libertati dant favorem*, does not apply to negroes in Georgia—the granting of freedom being against the express

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provisions of our Statutes, and opposed to the public policy of our laws.

This point is entitled to grave consideration.

By the Constitution of the United States, Congress were prohibited from preventing the importation of slaves into this country, prior to the year 1808, and that the people of the South, at the time of the adoption of the Federal Constitution, may have considered not only the retention, but the increase of their slave population, to be all-important to the interest and welfare of their States, may be legitimately inferred from this express reservation in the Constitution; yet, anticipating by ten years any action by the General Government, the people of Georgia forbade, by their Constitution and Laws in 1798, the further importation of slaves into this State, from Africa or any other foreign place, as well as from any other State in the United States.

The preamble to the Act of January, 1798, passed some four months before the adoption of the Constitution of that year, recites, that "whereas a practice hath hitherto prevailed of importing great numbers of slaves into this State for sale, from Africa and elsewhere, which is not consistent with the principles of benevolence and humanity, or consonant with the true interest and prosperity of the State," &c. And it proceeds to prohibit the further importation after six months, from all foreign places, under the penalty of one thousand dollars for every negro imported, and from any other State in the United States, after three months, under the penalty of five hundred dollars. (*Watkins' Digest*, 673-4.) The Constitution adopted on the 30th of May thereafter, declares that there shall be no future importation of slaves into this State, from Africa or any foreign place, after the first day of October next ensuing. (*Art. IV. §11, Cobb's Digest*, 1125.)

And this provision in our Organic Law, remains unrepealed to this day.

The Act of 1801, (*Prince*, 787) passed a few years afterwards, was to prescribe the mode of manumitting slaves in this State. Section 1st enacts, that this can only be done by the

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Legislature. Section 2d provides a penalty of \$200 for the offence of setting free any slave in any other manner, and further declares, that any slave so manumitted, contrary to the Act, shall still be a slave to all intents and purposes. Section 3d makes it unlawful for the Clerk of the Superior Court, or any other officer, to record any deed of manumission; or any other paper having for its object the setting free of any slave, and annexes a forfeiture of \$100 for this offence.

And thus the law stood, up to 1818, when the Legislature passed a supplementary Act, more effectually to enforce the Act of 1801. (*Prince*, 794.)

The preamble to this Act recites, that "whereas the principles of sound policy, considered in reference to the free citizens of this State, and the exercise of humanity toward the slave population within the same, imperiously require that the number of free persons of color *within this State*, should not be increased by manumission, or by the admission of such persons from other States to reside therein; and whereas divers persons of color, who are slaves by the laws of this State, having never been manumitted in conformity to the laws of the same, are nevertheless in the full exercise and enjoyment of all the rights and privileges of free persons of color, without being subject to the duties and obligations incident to such persons, thereby constituting a class of people equally dangerous to the safety of the free citizens of this State, and destructive of the comfort and happiness of the slave population thereof, which it is the duty of this Legislature, by all just and lawful means, to suppress."

Section 1st directs, that the Act of 1801 should be strictly enforced, and increases the penalties therein provided. Under the 3d section of the Act of 1801, forbidding any deed or other paper to be recorded, which had for its object the manumission of slaves, the Courts of this State held, that the whole instrument was null and void. Section 2d of the Act of 1818, declares that the said 3d section of the Act of 1801, should be construed to extend to inhibit the recording only of so much of any instrument as shall relate to manumission.

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Section 3d forbids free persons of color from coming into this State (seasons excepted). There are subsequent Statutes, regulating this subject) on pain of \$100; and on failure to pay, to be sold into slavery. Section 4th enacts, that every will, deed, whether by way of trust or otherwise, contract, agreement or stipulation, or other instrument, in writing or by parol, made and executed for the purpose of effecting or endeavoring to effect the manumission of any slave, either directly or by conferring or attempting to confer freedom on such slave, indirectly or virtually, by allowing and securing, or attempting to allow and secure to such slave, the right or privilege of working for himself, free from the control of the master or owner, or of enjoying the profits of their labor and skill, the same are declared to be utterly null and void; and the person making, or concerned in attempting to give effect to the same, whether by accepting the trust or in any other manner whatever, shall be liable to a fine, not exceeding one thousand dollars; and every slave thus attempted to be set free, is liable to be arrested and sold at public outcry.

The remaining sections of this Act, prescribe certain duties to be performed and observed, by free persons of color; and upon failure to comply, subjecting them to seizure and sale into perpetual servitude; except section 10th, which makes it the duty of all Courts and Judges to construe the Act and carry the same into operation, *according to the spirit, true intent and meaning thereof, as set forth in the preamble.*

In 1824 an Act was passed, repealing all laws and parts of laws, which authorized the selling of free persons of color into slavery. (*Prince, 800.*)

The preamble to the Act of 1829, recites that, "whereas it frequently happens that the citizens of this State decline a permanent guardianship of free persons of color, by which the ends of justice are prevented." And the Act makes provision that free persons of color may appear, by the aid of a next friend; and further, to facilitate the same object, it authorizes guardians of free persons of color to resign their appointment at any time. (*Prince, 802.*)

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The preamble to the Act of 1835 (*Prinds 509*) more effectually to protect free persons of color, and which is re-enacted in *totidem verbis*, by the Act of 1837, (*Chb 1011*) states that "free persons of color are liable to be taken and held fraudulently and illegally in a state of slavery, by *wicked white men*, and to be secretly removed, whenever an effort may be made to *redress their grievances*; and that due inquiries cannot be had into the circumstances of their detention, and *their right to freedom*, for remedy whereof," &c.

The foregoing analysis will suffice to indicate, I might say vindicate, the temper and tone of our legislation in reference to slavery. And notwithstanding the persevering efforts which have been made by the fanatics of the North to jeopard the safety of our people—rob them of their property—desecrate and disregard their constitutional rights, and violate and harass their domestic peace, it is truly gratifying to contemplate the justice, wisdom and moderation of our Legislature, respecting slaves and free persons of color! All the cruel attempts of these infuriated incendiaries have, hitherto, utterly failed to influence our people to forget their duty to themselves and this dependent race. Every Act upon our Statute Book, in reference to them, is replete, upon its face, with undeniable proof of that dispassionate deliberation which is the true characteristic of a great and magnanimous people. Humanity to our slaves and free persons of color, and a just regard to their rights and welfare, have never, in a single instance, been overlooked or unheeded.

The Constitution of 1798, whether wisely or not, established the fact, that the people of Georgia repudiated the policy of the further importation of slaves from abroad. Their views, as it respects their introduction from other slave States of the Union, have been more vacillating. We have already seen that as early as January, 1798, the Legislature passed a stringent *prohibitory* Act upon this subject. And it is worthy of notice, as explanatory of the spirit of the times, that the Grand Jury of Wilkes County, at the November Term preceding the passage of this Law, as appears from the minutes of the Court,

with *Elizah Clark* as their foreman, made a strong presentment in favor of the measure, as will appear by the following extract:

"We present as a grievance of the most alarming nature, the importation of negroes into this State; *whether by land or sea*, for the purpose of exposing them to sale, inasmuch as we conceive it to be greatly injurious to the welfare of the inhabitants thereof, *and highly repugnant to the principles of a free Government*—and do earnestly recommend it to the next Legislature to prohibit the same".

By the Penal Codes, both of 1816 and 1817, the introduction of slaves into the State, "either by land or water," was made highly penal, (*Lamar's Digest*, 608, 650,) unless brought by settlers. The Act of 1824 repealed the Act of 1817; the Act of 1829 revived the prohibitory Act of 1817. In 1841, it was again repealed; and in 1842, again revived. In 1849-'50, it was again repealed and all offenders relieved from prior transgressions. And in January, 1852, the preceding Act was again repealed, and the prohibitory law amended and revived. And thus, after travelling in a circle for the last half century, we have returned to the point from which we started. And there this subject, *for the present, rests*, having settled nothing permanently respecting it.

While public opinion has never wavered in this State, for the past fifty years, so far as *domestic* manumission was concerned, the same steadfastness of purpose has not been manifested, as to extra-territorial and foreign colonisation. The policy of transporting our free blacks to Liberia, received at its commencement in 1816, the sanction and approbation of our greatest and best men: The Honorable *William H. Crawford* was, I believe, one of the Vice Presidents elected at the organization of the American Society. And Mr. Justice *Wayne*, of the Supreme Court Bench, and others of our most distinguished citizens, continue still to give it their countenance and support.

In 1817, by an Act yet in force, the Governor was directed to deliver to the Colonization Society Africans illegally import-

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ed into this State, and, "to aid in promoting the benevolent views of said society, in such manner as he may deem expedient". (*Cobb's Digest*, 989.) By resolution again in 1820, certain Africans, illegally imported, were offered to this society. (*See Res. of 1820, vol. IV. p 5, of Resolutions.*)

In 1824, a resolution from the State of Ohio, on the subject of the abolition of slavery, having been laid, by the Governor, before the Legislature, and the report which was adopted thereon, after expressing regret "at this unnecessary interference on the part of a sister State," concludes with this sentence: "Georgia claims the right, with her southern sisters, whose situation, in this regard, is similar, of moving this question when an enlarged system of benevolent and philanthropic exertions, in consistency with her rights and interest, shall render it practicable". Is it not apparent, that up to this period, the true character of the institution of slavery had not been fully understood and appreciated at the South; and that she looked to emancipation, in some undefined mode, in the uncertain future, as the only cure for the supposed evil? Thanks to the blind zealots of the North, for their unwarrantable interference with this institution. It has roused the public mind to a thorough investigation of the subject. The result is, a settled conviction that it was wisely ordained by a forecast high as heaven above man's, for the good of both races, and a calm and fixed determination to preserve and defend it, at any and all hazards.

Governor Troup, ever zealous for the honor and safety of the State—the purest of patriots and the most incorruptible of men, brought this subject prominently before the Legislature, at its extra Session in 1825. He urged them to "temporize no longer; that one national movement for its overthrow, unresisted, all would be lost; that like the Greeks and Romans, the moment we ceased to be masters we should become slaves; that the institution constituted our moral and political strength; that if slavery were abolished, we should stand stripped and desolate under a fervid sun and upon a generous soil, a mockery to ourselves, and the very contrast of what, with a little firmness and foresight, we might have been. And while it was

not too late, he entreated the South to step forth, and "*having exhausted the argument, to stand by their arms*".

But this heroic champion of the South, and staunch defender of *Constitutional Union*, was in advance of his age. The fervid appeal was responded to by a special committee, to whom this portion of the message was referred, in the same tone of haughty defiance in which the communication was written. And both documents being denounced by the press, and politicians, and people of the times, as treasonable to the Union, were suffered to sleep the sleep of death.

In 1827, the question as to the right and propriety of the Congress of the United States appropriating money from the public Treasury, in aid of the Colonization Society, was fully discussed by the Legislature; and it resulted in the adoption, by that body, of a very able report and resolutions, condemnatory of the project. The General Assembly, speaking in behalf of the people of Georgia, say, "They know and strongly feel the advantages of the Federal Union; as members of that Union, they are proud of its greatness; as children born under that Union, they will ever defend it from foes internal as well as external: but they cannot and will not, even in preservation of that union, permit their rights to be assailed; they will not permit their property to be rendered worthless; they will not permit their wives and their children to be driven as wanderers into strange lands; they will not permit their country to be made waste and desolate by those who come among us, under the cloak of a time-serving and hypocritical benevolence."

"At the first establishment of the Colonization Society, whatever may have been intended or avowed as its object, your committee believe that they can say with truth, that the general impression in the Southern States as to that object was, that it was limited to the removal, beyond the United States, of the *then* free people of color and their descendants, and none others. Under this impression, it at once received the sanction and the countenance of many of the humane, the wise and patriotic among us. Auxiliary societies were formed in our

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own State, and the members—the influence and the resources of the society—were daily increased. It is now ascertained that this impression was false; and its officers and your committee believe the society, itself, now boldly and fearlessly avow that its object is and ever has been, to remove the whole colored population of the Union to another land: and to effect this object—so wild, fanatical and destructive in itself—they ask that the general fund, to which the slave-holding States have so largely contributed, should be appropriated for a purpose so especially ruinous to the prosperity, importance and political strength of the Southern States.” (*Dawson's Compilation, p. 84 of the Resolutions.*)

And again, in 1828, the Legislature having under consideration resolutions from the States of South Carolina and Ohio, which latter State has, for the want of employment at home at sundry times, manifested a very tender concern for ours, says, “These States must view with jealousy and distrust all associations, having for their object the abolition of slavery. The principles propagated by the enthusiastic devotees of this project, are calculated to have the most pernicious effects: exciting false hopes of liberty; producing discontent and dissatisfaction in the mind of the otherwise happy and contented slave, and a restlessness for emancipation, when the actual state of things forbids the possibility of it at present. The Colonization Society is considered, by your committee, as one of a dangerous character in this respect. Its schemes of colonization are vain and visionary. Its professed objects never can be accomplished. They are wholly impracticable. This institution, therefore, should not, in the opinion of your committee, receive the support, countenance or patronage of Congress. And not being a matter of national interest, the Government has no right to take it under its protection, or make appropriations for its support.” (*Dawson's Compilation, p. 116 of the Resolutions.*)

So much for our legislation upon this subject. The matter has undergone judicial investigation before the Courts of this State.

James A. Bradley, by his will, among other things, directed that if any of his slaves should desire to go to the African Colony they should be permitted to do so; and their expenses to the port of embarkation should be paid. A bill was filed by Reuben Jordan, the executor, to which the heirs and distributees were made parties, asking the direction of the Court as to the execution of the will. In opposition to this emancipation clause, the Act of 1818 and the preceding Acts were relied on, declaring, in substance, as we have seen, that any will or other instrument intended to give freedom to slaves, should be null and void. But Judge Crawford held, that the will was not obnoxious to these Statutes, nor inconsistent with the policy of our laws. And this decision, if I am correctly informed, was unanimously affirmed by the Judges in Convention—a bench composed of men, who, in the prophetic, but quaint language of Fuller, in speaking of Lord Coke, will be memorable “while fame has a trumpet left her or any breath to blow therein.”

In delivering the opinion in that case, the Court say (*Dandley*, 170): “The Act of 1818 and those which preceded, were intended to prevent the emancipation of people of color in this State, where their presence could not fail to be injurious to the slave population. This is the evil intended to be prevented; and it is to guard against this evil, that the provisions of the said Statute and those which preceded it were enacted. This will does not contemplate that the slaves emancipated by it will remain in the State, to the annoyance and injury of the owners of slaves. It, therefore, does not come within the reason of the law. It is not calculated to produce the mischief intended to be guarded against by the Legislature of the State upon this subject. The policy of our legislation, since 1798, has certainly been unfavorable to the increase of the number of slaves in this State. The Constitution of that date roundly prohibits the importation of slaves into this State, from Africa or other foreign places, after the first day of October of that year.”

“Upon the best consideration which the Court has been able to bestow on this case, it is of the opinion that neither

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the letter nor intention of the several statutes of this State are in opposition to the provisions of the will of James A. Bradley, deceased, in regard to his slaves. The preamble to the Act of 1818 shows, conclusively, the nature of the evil intended to be remedied by that Act; and that evil will not be produced or increased by the execution of this will, in accordance with the obvious intentions of the testator. Neither the laws nor the settled policy of the State interpose any obstacle to its execution in relation to the slaves."

And let it be borne in mind, that it was made the duty of *all* Courts and Judges, before whom *any* proceedings may be had under the Act of 1818, "so to construe the several provisions thereof, as to carry the same into full and complete operation, according to the true spirit, intent and meaning thereof, as declared in the preamble of the same."

This point again came before Judge CHARLTON of the Eastern District, and was ruled the same way, although, at that time, he had not, it seems from a note appended to the report of the case, seen the decision in Dudley. There is a remarkable resemblance between the emancipation clauses in that will and this. It is not unlikely that the *Judge* in the one case was the *draftsman* in the other. The will of John Dugger, Jr. contained (amongst others) a clause in the following words: "It is my will and desire, should it please God to remove me at this time, that my negro woman, Antoinette and her two children, together with my negro man Jack, should be emancipated and set free, if it can be done in any manner, either by the Legislature or otherwise; and if it cannot be accomplished, then I direct my executors hereinafter named, to send them where it can be done out of the State." *Kaser vs. Marlow et al.* (*R. M. Charlton's R.* 542.)

The Court says: "I do not acquiesce in the decision of the Honorable the Court of Ordinary, in causing the whole of the clause relating to these slaves to be expunged from the will. It is a cardinal rule in the construction of wills, that the interpretation should be favorable and as near the mind and intent of the party, as the rules of law will admit. So it is, if the

words will bear two senses, one agreeable to and another against law, that sense shall be preferred which is most agreeable thereto. Taking these rules for our guides, we might make this will perfectly legal and operative, in regard to these slaves, by expunging the word "either" and "or otherwise"—(and it is only the illegal part that ought not to be recorded)—and then it will read thus: "It is my will and desire, should it please God to remove me at this time, that my negro woman Antoinette, and her two children, together with my negro man Jack, should be emancipated and set free, if it can be done in any manner by the Legislature; and if it cannot be accomplished, then I direct my executors hereinafter named, to send them where it can be done out of the State." Is there any thing illegal in this? Would such a will come in conflict with the policy of our Statutes upon the subject? John Dugger might, in his life-time, have applied to the Legislature to manumit these slaves, without incurring any penalty. And may he not ask his legal representative to make the same application after his death? At any rate, if the rights of creditors do not intervene, (and the executors have not shown such rights to exist) an individual has assuredly the power to send his slaves out of the State for any purpose, although he might not be permitted to bring them back. Can he not ask, by his last will and testament, that this should be done by those to whom he has entrusted his property, and who are sworn to obey his instructions?

"The intent of the Statutes is expressed in the preamble to the Act of 19th December, 1818. (*Prince's Digest* (old) 465, (new) 795.) The object of the Statute's relating to manumission, was to prevent a horde of free persons of color from ravaging the morals and corrupting the feelings of our slaves. Experience has taught our legislators that such a class, lazy, mischievous and corrupt, without any master to urge them to exertion, and scarcely any motive to make it, was an extremely dangerous example to our naturally indolent slaves. They, therefore, declared that such a class should not be increased by manumission (save by consent of the Legislature) or by the admission of such persons from other States to reside therein.

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The Legislature, then, is the proper tribunal (if I may use that term) to determine whether the case presented, is one in which none of these dangers exist—one for which reason and humanity plead. To them, the executors, in the discharge of one of the most solemn of all duties, the performance of the dying injunctions of their friend, should make the application, and if it should be refused, then they should fulfil the alternative command of their testator, by sending these slaves out of the State."

When this question came incidentally before this Court, in *Vance vs. Crawford*, (4 Ga. R. 460) it was no longer viewed as an open question. The adjudications referred to, especially the former, had obtained general notoriety. It was made at the seat of Government, during the session of the General Assembly, and if I remember right, was published in the newspapers of the day. It had, when this Court was first organized, been looked to as the settled construction of the law, for fifteen years, and no attempt had been made by the Legislature to disturb it, or if made, was unsuccessful. This Court did not feel at liberty, therefore, to interfere with a judgment thus solemnly and authoritatively pronounced, and so long acquiesced in. And having, heretofore, in *Bryant vs. Walton*, (14 Ga. R. 185) expressed my views pretty fully upon this subject, I am content to leave it, with this rapid retrospect at the past action of the State concerning the matter, both legislative and judicial. Whatever change is made, if any, should be by the law-making, rather than by the law-administering department of the government.

It was said of Chief Justice *Bridgman*, while at the bar, that "he always argued like a *lawyer* and a *gentleman*." I cannot, in conclusion, in justice to my own feelings, forbear to apply this highest of all professional commendation, to the distinguished Counsel who have conducted this cause.

NOTE.—Judge LUMPKIN, although present at the discussion, consultation and decision of this case, was not present when the judgment of the Court was pronounced. It fell to his lot,

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however, to write out the opinion. It is due to Judge BURNING to state, that he took occasion to say that he did not consider himself committed as to the construction put upon the Acts of 1801 and 1818, prohibiting manumission.—REPORTER.

No. 54.—*Ex dem.* WILLIAM HENDERSON, plaintiff in error, vs. ROE and WILLIAM P. HACKNEY and others, defendants.

- [1.] To make a certificate from the Executive Department admissible in evidence, it is not necessary that the certificate should give a copy of that to which it relates. It is sufficient that it gives, *substantially*, the contents, or a part of the contents, of the thing to which it relates.
- [2.] A grant is made to Elias Nicks. Evidence going to show that the grantee is sometimes known as Elias Nicks and sometimes as Eli Nicks, is not such evidence as varies or contradicts the grant.
- [3.] The Court or Jury may compare two documents together, when properly in evidence, and from that comparison, form a judgment upon the genuineness of the handwriting, or the identity of the writers.

Rejection, in Whitfield Superior Court. Tried before Judge JOHN H. LUMPKIN, April Term, 1854.

The plaintiff in this cause introduced a deed, dated August 5th, 1839, from *Eli* Nicks to himself, for the land in dispute; and a grant from the State to *Elias* Nicks, of Walden's district, Pulaski County, for the same lot, dated May the 10th, 1841, recorded 23d January, 1840. The land was drawn in the Cherokee Land Lottery.

The plaintiff then offered in evidence a certificate from the Secretary of the Executive Department, under the seal of that department, to the effect that he had examined the lists for

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draws in said lottery, returned from Pulaski County; and that he found the name of Elias Nicks of Walden's District entered for two draws; and the name of Miles Nicks of McDaniel's District, for one draw, and that no other person, by the name of Nicks, was entered on said lists from that county.

This evidence was objected to, and was ruled out by the Court; which is excepted to by the plaintiff.

The plaintiff then offered the testimony of Aden Scarborough, James Holland, and John Holland, taken by interrogatories, which was to the effect, that the witnesses were acquainted with Walden's District in Pulaski County, at the time when the draws for the Cherokee Lottery were given in; that they knew a man in the District named Eli Nicks, but none named Elias Nicks; that Eli Nicks claimed to be the drawer of the lot in question; that they never knew him to spell his name Elias, nor to assume any other name than Eli; and that it was common for persons to give in for draws in other counties than where they lived, but it was common for them, in that case, to state the county and district where they lived.

To this testimony, defendants' Counsel objected, on the ground that it attacked the grant; which could only be done by a proceeding instituted for that purpose. The objection was sustained by the Court, and the testimony excluded; to which plaintiff excepted.

Plaintiff then proved, that in 1847, he had commenced building a house on the lot; that going there one morning, he found Morris, one of the defendants, in the house, with several others; that Morris refused to let him have possession, claimed the land as his own, and offered to compare titles.

Plaintiff then proved by William P. Hackney, that he (Hackney) went on the lot as tenant of Morris, in 1846.

Here the plaintiff closed.

Defendant introduced a deed for the lot, from Elias Nicks (describing himself as of Dale County, Ala. but formerly of Walden's District, Pulaski Co. Geo.) to Absalom Holcombe, dated 16th May, 1841, and recorded 8th Oct. 1842.

Defendant traced title from Holcombe to himself, and closed.

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Plaintiff requested the Court to charge the Jury, that if they were satisfied that the same person executed the two deeds to plaintiff and to Holcombe, that the oldest deed (being recorded in time) passed the title to the first purchaser,

Which charge the Court refused to give, but charged the Jury, that they had no right to compare the signatures of the deed to Henderson, with that to Holcombe, for the purpose of determining whether the same person made both deeds, because that would be indirectly attacking the grant, which the Court had held could not be done collaterally.

The Court further charged, that if Hackney was in possession under Morris, in 1846, and continued in possession in 1847, then Henderson, in 1847, was a trespasser, and could not recover on the strength of a possession thus taken; that in no event could the plaintiff recover against one in possession, and not a trespasser, when paramount title was shown in another; and that, if there was a grant to Elias Nicks, that did show paramount title out of the plaintiff; and further, that the Court had refused to permit the plaintiff to show that Eli and Elias Nicks were one and the same person, and the Jury could not presume nor infer it. To which charges the plaintiff excepted.

The Jury found for defendants, and plaintiff assigns error on the various rulings of the Court, as excepted to.

SHACKELFORD, HANSELL, MARTIN & WOFFORD, for plaintiff in error.

T. B. MOORE, AKIN, UNDERWOOD, for defendant.

By the Court.—BENNING, J. delivering the opinion.

The deed to Henderson, the plaintiff below, having been made by *Eli Nicks*, and the grant from the State having been made to *Elias Nicks*, it was important to Henderson to show that *Eli Nicks* and *Elias Nicks* were the same person.

To show this, any thing going to show how many *Elias Nickses* or *Eli Nickses* there were in the district of the residence

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of the drawer, ~~at~~ the time of the giving in for draws, would be pertinent evidence. And how many there were of these, the certificate from the Executive Department would go to show.

That certificate, therefore, was relevant.

Was it also legal evidence? The Court below rejected it, but on what ground, does not appear. The ground taken before this Court, for sustaining the rejection of it, was that the certificate does "not purport to contain a copy of any record document or paper of file"; and the Act of 1819, (*Prin. Dig.* 215,) was cited in support of this ground. That Act, it is true, does not authorize the use of such a certificate, as evidence. But there is another and a later Act which does—the Act of 1830. (*Prin. Dig.* 220.)

This Act makes the certificate of any public officer, under his hand and seal of office, if one is attached thereto, either of this State or any county thereof, in relation to any matter or thing pertaining to their respective offices, or which, by presumption of law, properly pertains thereto, admissible as evidence, before any Court of Law or Equity in this State. This is the Act, and this does not say that the certificate to be admissible, must give a copy of something. It is to be admissible, if it relates to "any matter or thing" pertaining to the office of him who gives it. And a certificate may relate to a matter or thing, without giving a copy of it. If it states that such and such are the contents of the thing, and such and such are not, it relates to the thing. And this is what this certificate does. It certifies that certain names of the Nickses appear on the list of drawers of land, for a particular district and that no other names of the Nickses do. Instead of giving, by copy, the whole contents of the list, it gives, *substantially*, what is part of the contents of the list; and it certifies that the part given is all that the list contains of the kind given.

This list was a thing which pertained to the Executive Office.

[1.] The certificate, therefore, was legal, and being also relevant, it was admissible in evidence. The Court, therefore, erred in rejecting it.

[2.] The interrogatories offered by the plaintiff, and rejected by

the Court, were such, that if they had been admitted to the Jury, the Jury might, perhaps, have inferred from them, that the Eli Nicks of the plaintiff's deed, and the Elias Nicks of the grant, were one and the same person; and that that person sometimes passed by the name of Eli, sometimes by the name of Elias. And such an inference, if made, would not be in contradiction to or in variance of the grant. A grant is made to a person, not to a name. (11 Ga. 282.)

These interrogatories, therefore, were admissible for the purpose of showing that the Eli Nicks of the plaintiff's deed, and the Elias Nicks of the grant, were one and the same person—a person who was known by the one name, as well as by the other: but they were not admissible, for the purpose of showing that the true drawer was a man named Eli Nicks; and that by mistake, the grant was issued to another man named Elias Nicks.

The Court, therefore, should have admitted them.

[8.] The Court or Jury may compare two documents together, when *properly in evidence*, and from that comparison, form a judgment upon the genuineness of the hand-writing, or the identity of the writer. (*Phil. Ev. note 915. 1 Green. Ev. §578.*)

The Court should have told the Jury, therefore, that they might compare the signatures of the two deeds, one signed Eli Nicks, the other Elias Nicks, to see whether the signatures were both made by the same person, for these deeds were properly in evidence; and if made by the same person, the older ought to have prevailed.

The decision of these questions makes it unnecessary to decide the others.

There ought to be a new trial.

Horshaw vs. Lessee Cook.

No. 55.—SIDNEY HORSHAW, plaintiff in error, vs. THE LESSEE
of WILLIAM COOK, defendant in error.

[1.] The mere absence of his Counsel, with the title papers of a defendant, is not a sufficient ground for a continuance.

Ejectment in Union Superior Court. Tried before Judge
IRWIN, April Term, 1854.

Horshaw, the defendant below, moved a continuance in this case, on the ground that A. J. Hansell, Esq. was employed for the defence, and had in his possession the title papers for the lot of land in dispute, under which defendant held, showing title out of the lessors of the plaintiff; and that he had promised to attend the Court with the papers, without Providential hindrance; that he did not attend the Court regularly but frequently; and the cause of his absence was not known. W. H. Stansell, of Counsel for defendant, farther stated, in his place, that he conversed with General Hansell a short time previous to the Court, and that he had spoken of certainly attending the Court.

The Court over-ruled the motion, and this decision is assigned as error.

MILNER, for plaintiff in error.

J. W. H. UNDERWOOD, for defendant.

By the Court.—STARNES J. delivering the opinion.

This Court has decided, and upon sound principles, that the mere absence of Counsel is not a sufficient ground for the continuance of a cause. See *Allen vs. the State*, (11 Ga. R. 85) and the cases there cited. It has recognized the absence of the leading Counsel from Providential cause, as sufficient to authorize a continuance; but nothing short of this. It does not appear that General Hansell was even the leading Counsel

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in this case; and it is to be presumed he was not, or it would have been shown; nor does the cause of his absence appear.

The fact that he had defendant's title papers with him, cannot help the showing. The law required the defendant to have these papers at Court, that he might be in readiness for trial. It was at his own risk, therefore, and manifested a want of proper diligence, when he permitted another, especially one who was not his leading Counsel, to keep them in his possession, and away from Court.

Let the judgment be affirmed.

No. 56.—SARAH A. THOMPSON and others, plaintiffs in error,
vs. JOSEPH P. MCCULLOCH, defendant in error.

[1.] A bill cannot be sustained, which seeks to charge the defendant, as administrator, at the same time denying that he is such; leave will be granted to the complainants, however, to amend, by striking out that portion of the bill which controverts the validity of the trustee's appointment.

In Equity, in Walker Superior Court. Decision by Judge JOHN H. LUMPKIN, May Term, 1854.

Sarah A. Thompson and others, the distributees and heirs at law of William Thompson, deceased, filed their bill against Joseph P. McCulloch, as administrator on the estate of William Thompson, alleging that he had, through a third person, purchased valuable real estate at his own sale, for a small price, and praying to set aside the sale, and for a general account.

After answer, complainants amended their bill, alleging that the defendant never was legally appointed administrator on said estate, and setting forth the order of his appointment, and shewing that the requisites of the Statute had not been

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complied with, and praying that the appointment might be declared null and void.

To the bill as amended, defendant demurred for want of Equity. The Court sustained the demurrer and dismissed the bill, and this decision is assigned as error.

AKIN, for plaintiff in error.

TRIPPE, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The bill, as amended, cannot be sustained. As at first framed, it made a clear case for Equity. As amended, the complainants, by their own showing, have a full, complete and adequate remedy at Law. Consequently, it is not a case of election; for by electing to abide by the amendment, they elect to go out of Court:

The judgment below, then, must be affirmed, with leave to the parties to strike out the amendment and stand upon the original bill. Upon the doing of which, within a reasonable time, it is the direction of this Court that the order dismissing the bill be set aside, and the cause re-instated.

No. 57.—JOHN M. FREEMAN, administrator of Jas. W. Aaron, plaintiff in error, vs. LEVISA FLOOD, defendant.

[1.] No particular form of words is necessary to create a separate estate in a married woman. It is enough, if there be a clear intention to exclude the marital rights of the husband. Subject to this rule, the words "I give to my daughter V W two negroes, to-wit: Sally and Dicey, to remain in her possession, and for her special use and benefit during her natural life, and at her death, to go to her children forever, and to no other use what-

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- ever," create a separate estate in Y W; especially when their meaning is aided by other features of the will.
- [2.] Neither is any particular form of words necessary to restrain the alienation of such an estate: but the intention must be clear. And subject to this rule, the words "to so other use whatever," explained by other words in the will, and associated in the same sentence with the words "to remain in her possession," &c. operate as a restraint upon alienation.
- [3.] Where, shortly after the marriage of the daughter of B, and when she and her husband were about leaving for home, B brought out a negro girl slave, and said, "Here is this girl; you can take her home with you; she is not worth much; she will do to pick up chips; I do not give her to you now, but I never expect to take her back": Held, that these words did not amount to a gift of the slave, who was afterwards bequeathed to the daughter in the will of B.
- [4.] A daughter who permits a negro slave which has been settled upon her by the will of her father, as her separate property, and with restraint upon the power of alienation, to go into the possession of a son-in-law, is not stopped from asserting her right to the same, as against the administrator of that son-in-law.

Troyer, in Franklin Superior Court. Tried before Judge JACKSON, October Term, 1854.

This was an action brought by Levisa Flood to recover a negro.

The plaintiff introduced in evidence the will of her father, John Bellamy, who died in 1829, and whose will had been regularly proven; &c.

The will contained several items.

The 1st was to his wife, of certain property, "during her natural life or widowhood." The 2d, 3d, 4th and 5th items were bequests to different sons in the usual words, without any peculiar expression: The 6th was in these words: "I give my daughter Lucy two negroes, to-wit: a woman and one boy child named Berry; also one feather bed, to remain in her possession and for her special use and benefit, during her natural life; and at her death to go to her children, together with the increase of the woman forever, and by no means to be disposed of in any other manner whatever."

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The 7th item was, "I give to my daughter, Patsey Brauner, (certain land described) also one negro woman and child now in her possession, named Mary, to remain in her possession and special use and benefit during her natural life, and at her death, to go to her children forever, and to no other use whatever."

The 8th item, which is the one now in question, is as follows: "I give to my daughter, Visey Westbrook, (who is Mrs. Flood, the present plaintiff,) two negroes, to-wit: Sally and Dicey, to remain in her possession, and for her special use and benefit, during her natural life; and at her death, to go to her children forever, and to no other use whatever." The 9th item was, "I give to my daughter, Elizabeth Bellamy, two negro girls, named Kitty and Anna, also one feather bed and furniture."

The remaining items were bequests to sons and grand-sons, and had no peculiar expressions.

The plaintiff proved that the Visey Westbrook named in the 8th item of the will was herself; that the negro Catherine now sued for was the child of Sally, mentioned in said item; that said Sally, about the year 1818, belonged to, and was in the possession of said John Bellamy; that about that time (his daughter Levisa having been married about a month to Joshua Westbrook, and having gone to live at their own house, but being on a visit to her father's with her husband) Mr. Bellamy brought out the girl, and said to his daughter, as she and her husband were about to start home, "here is this girl; you can take her home with you; she is not worth much, but may do you some good; she will do to pick up chips; I do not give her to you now, but I never expect to take her back."

The said negro Sally remained in the possession of Westbrook and his wife, until his death; and the plaintiff intermarried with John L. Flood, who is also dead; that the negro Catherine was in possession of plaintiff while a widow, and after her last marriage.

The plaintiff closed, and the defendant stated the proof which he expected to make; and it was consented that the case should be withdrawn from the Jury, and the judgment of the Court pronounced upon the plaintiff's proof, and that offer-

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ed by the defendant, which was thereupon stated by Counsel as follows:

That the negro woman Sally had been in possession of Westbrook and his wife ten or twelve years before the death of old Mr. Bellamy; that Joshua Westbrook exercised acts of ownership over her as his own, as long as he lived; that after his death the plaintiff intermarried with John L. Flood; that in the year 1845, the girl Catherine went into the possession of James W. Aaron, who married a daughter of plaintiff, by her first husband, Westbrook; that she went there by consent of the plaintiff, and remained in the possession of said Aaron during his life, and that defendant is his administrator, and has had said negro in possession ever since; that said Aaron departed this life in 1850; and also, that it was at the express suggestion of plaintiff that said girl went into the possession of her son-in-law and daughter; that several other children had married off in the same way, and had had negroes given them upon their marriage, by the solicitation of the plaintiff; and he offered further to prove, that said plaintiff had urged the sale of Sally and her children to others.

The Court held that the 8th item of the will of John Bellamy created in the plaintiff a separate estate for her life, restraining the power of alienation; that the words of Mr. Bellamy, in placing the negro Sally in his daughter's possession, reserved the right of property in himself, and constituted the proceeding a loan and not a gift; that Westbrook's possession was Bellamy's possession; and all ordinary acts of ownership, such as working and using the negro as his own, on the part of Westbrook, could not set up title in him against Bellamy; that in order to get title by the Statute of Limitations, it would be necessary for defendant to show that Westbrook set up title to the negro, independent of the loan, and notified Bellamy thereof; and that the present plaintiff is not estopped by her consent, express or implied in her husband's presence, to the arrangement by which she was dispossessed,

. . . To which rulings of the Court, the defendant excepted. . .

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C. PEEPLES; NASH, for plaintiff in error.

COBB & HULL; T. R. R. COBB, for defendant.

By the Court.—STARNES, J. delivering the opinion.

It is unnecessary for us to consider that vexed question of law which was brought to our attention, and which involves the consideration of a married woman's right to dispose of her separate estate, as a *feme sole*, where she is not restrained by the instrument creating it; for in our opinion, the terms of John Bellamy's will do restrain the right of his daughter, Mrs. Westbrook, to alienate the slave in question.

[1.] The first question on which it is proper for us to express an opinion is, whether or not the language used by the testator, John Bellamy, in the bequest of the mother of the slave in controversy, created a separate estate in his daughter, the defendant in error.

Pursuing rules proper for the construction of such instruments, let us examine this will of John Bellamy in its different features, and gather therefrom, if it be possible, the intention of the testator in this respect. Such an examination will show, we think, that in the 1st clause of his will, he has made a provision in favor of his wife, without any words of limitation. By the 2d, 3d, 4th, 5th, 10th, 11th, 12th, and 13th clauses, he has made bequests to his sons and grand-sons in like manner. In the 9th, he has given property to an unmarried daughter, without any such restriction. In the 6th, 7th, and 8th, clauses he has bequeathed property to three of his daughters, with limitations and restrictions, very similar in character. These restrictions are *to the special use and benefit* of these daughters, *and to no other use, or to be disposed of in no other manner whatever.*

Now two of these three daughters, as the record shows, were married; and the probability is, the other was so as the testator refers to her children. And as we find these restrictions im-

posed by the testator just where he is making provisions for married daughters, and no where else, the inference is a fair one, that he designed thereby to give a separate estate to these daughters.

Taking into consideration the fact, that no particular form of words is necessary to create a separate estate in a married woman; that it is enough if there be a clear intention to exclude the marital rights of the husband, let us examine this bequest more particularly. The language used is, "I give to my daughter Wisey Weetbrook, two negroes, to wit: Sally and Dicey, to remain in her possession; and for her special use and benefit, during her natural life; and at her death, to go to her children forever, and to no other use whatever". These words, "for her special use and benefit, during her natural life," taken in connection with the other words employed, are appropriate to the creation of a separate estate. It is true, that *special use* does not signify *separate use*; but a special use in a married woman, which is given to be enjoyed by her during her natural life, and to be taken or disposed of to no other use whatever, excludes, of course, the marital rights, and must necessarily be a separate use.

By looking to adjudicated cases, we find that similar words have been considered as significant of an intention to create a separate estate.

In *Darley vs. Darley*, (8. Atk: 399) the words, "for her own livelihood," were deemed sufficient for this purpose. In *ex parte Rag*, (1 Madd: 119) this meaning was supposed to be expressed by the words, "For her sole use". In *Heathstone vs. Hall*, (8 Irtd: 414) the words, "in trust for the entire use, benefit, &c. were said to create a separate estate. In *Newman vs. James*, (12 Ala. 29) this intention was said to be manifested by the words, "To have and to hold the same to and for her use, benefit and right, &c. without let, hindrance or molestation". "To be for her and her family's use, during her natural life; and her children, to enjoy it after her death," was the language which was held to have such import in a case in Pennsylvania: (5 Barr. 335.) "To her own proper use," were

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words considered of a similar signification. (10 Barr. 428.) None of these words, in our opinion, more strongly indicate an intention to create a separate estate, than those used in the case before us, especially when they are taken in connection with all the terms and provisions of the will.

[2.] We are next called upon to inquire, whether, or not there are, in this bequest, words which were intended to operate as a restraint upon the alienation of the slaves bequeathed.

Here again no particular form of words is necessary; but the intention must be clear. The intention is clear, we think, in this bequest, and is manifested, in the first place, by the words "to no other use whatever".

On looking to the 6th clause of this will, we find the property given to the daughter, "to her special use and benefit," &c. "and by no means to be disposed of in any other manner whatever". In the 7th and 8th clauses the testator substitutes, in the place of these latter words, the phrase, "and to no other use whatever". Now we think that he employed these two phrases in the same sense, and supposed them to have the same import. They occur in clauses otherwise similar, (except as to the names and the property conveyed); they were bequests to his married daughters, as we suppose; they are of kindred import, and it seems quite reasonable to conclude that he intended the two to have the same signification. But it is admitted for the plaintiff in error, that the words, "by no means to be disposed of in any other manner whatever," operate as a restraint upon alienation. And so we think do the similar words, "to no other use whatever," which we have shown were probably used by the testator, as synonymous with these.

It was suggested by the Counsel for the plaintiff in error, that these words, "to no other use whatever" were probably applied by the testator to the gift in remainder to the children, and were intended to have the effect of creating an estate in a particular class of heirs, or a perpetuity. These are not very apt words for such a purpose, and to adopt this construction, would be to look away from a construction which imputes an intention to the testator consistent with law; and reasonable,

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as one which attributes an illegal intention to him, and which, under the circumstances, is unreasonable.

In the next place, in this connection, some importance is to be attached to the words, "to remain in her possession," &c. If it were intended, thereby, that the daughter was not to part with these slaves, but they were to remain in her possession during her life, of course this would be inconsistent with the power of alienation.

This construction may be considered weakened by the fact, that one of these slaves was already in possession of testator's daughter, Mrs. Westbrook; and it may be supposed that he intended to provide only that she should retain possession of this slave. But the same terms were applied to others (to Dietz, for example) who were not in possession of testator's daughters, so far as we can tell from this record.

Taking all these things together, we think the intention of this testator, to restrain the alienation of these slaves by his daughter, quite clear.

[3.] The Statute of Limitations did not protect this plaintiff in error, for the very satisfactory reasons assigned by his Honor, Judge JACKSON; and as he has shown, the words and conduct of John Bellamy did not amount to a gift of the slave to his daughter and her husband, Mr. Westbrook, and could not properly be considered as more than a loan of the same.

[4.] It was insisted that the defendant in error was estopped, by her own acts, from denying the title of the plaintiff in error, to the slave Catherine, as representing his intestate, and that such denial was a fraud upon his intestate's estate.

This cannot be, if Mrs. Flood was prohibited by the will of her father from parting with this property. That will was the law by which she held the slave, and if it forbade her to alienate the same, or to part with her to any person, and yet she did it, that act was without authority, and no title was taken by her son-in-law and daughter. It was to prevent the married woman possessing a separate estate, from conveying away, or parting with the same, that this restraint upon alienation was devised. In tender regard to her situation, it was design-

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ed that she should not be influenced to part with her property to any one. If it were permitted at all, under many pretences or evasions, it would be easy, if her own generous and devoted heart did not prompt it, for an embarrassed or unprincipled husband to influence her to dispose of it for his relief or benefit. Hence, the rule which I have stated. Very little would be gained by such a rule, however, if the wife who did part with her separate property, was ever after estopped thereby from denying the title of the person who might be in possession of it; for in such event, that might always be done by circuitry which could not be done directly; and all advantage of restraints upon alienation would be wholly destroyed. Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT SAVANNAH,
JANUARY TERM, 1855.

Present—JOSEPH H. LUMPKIN,
EBENEZER STARNES, } Judges.
HENRY L. BENNING,

No. 58.—MICHAEL SANDERS, plaintiff in error, *vs.* JOHN DAVISON, defendant.

[1.] By the laws of this State, the Inferior Courts of the respective counties thereof have no power to issue land warrants, the original jurisdiction over this subject being conferred, by the Act of 1789, *exclusively* upon a Land Court, constituted of three or more Justices of the Peace.

Caveat, in Richmond Superior Court. Decided by Judge HOLT.

This was a case of conflicting land warrants, issued under the Head-right Acts, and covering the same land.

The older warrant had been issued to the plaintiff in error, by three Justices of the Inferior Court, sitting as a Land Court, and the younger one to the defendant in error, by four Justices of the Peace, sitting as a Land Court.

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Upon a caveat filed by the defendant in error, the Court below held that the older warrant was void, because Justices of the Inferior Court are not authorized to sit as a Land Court.

And on this decision, error is assigned.

A. J. and T. W. MILLER, for plaintiff in error.

WALTON, for defendant.

By the Court.—LUMPKEN, J. delivering the opinion.

[1.] Can the Inferior Courts of the respective counties of this State sit as a Land Court?

By the Act of February, 1783, (*Watkin's Dig.* 260,) opening a general land office in Georgia, a majority of the Justices belonging to each county, constituted a Land Court. By the Act of August of the same year, any five of these Justices, (one of them being an assistant Justice, as he is called,) composed a board for that purpose. (*Watkins*, 286.) And thus the law stood until 1789. By a supplemental Act to the several Land Laws passed that year, this power was given to three or more Justices of the Peace. (*Watkins*, 407.)

That there was no intervening Act between these, is apparent, not only from an examination of the Statute Book, but from other considerations. The compiler of the laws, in a marginal note to the original Act of February, 1783, refers to the modification of that Act by the subsequent Acts of August, 1783, and December, 1789. And in the note to the Act of August, 1783, he again refers to the following Act of 1789, as the final action of the Legislature upon this subject.

But this is not all which goes to prove that there was no intermediate legislation, regulating Land Courts. The Act of 1789, purports to be supplemental to the several Land Laws theretofore passed in this State, and enacts that three or more of the Justices of the Peace may use and exercise the powers given to four Justices and one assistant Justice, by the Act of August, 1783. Now this supplemental Act of 1789 was passed on the

same day with the general Judiciary Act of that year. By this latter Act, the Superior and the Inferior Courts, proper, were separated and established, and the jurisdiction of each defined. And the argument for the plaintiff in error is, that at this time, the power that had been before used and exercised by the Land Court, as organized under the previous Acts of February and December, 1783, was vested in the Inferior Courts, proper, and that it has been continued there ever since.

If this be so, is it not a little remarkable, or rather unaccountable, that the supplemental Act passed the same day, giving the powers of the Land Court to three or more Justices of the Peace, should make no reference, whatever, to the Inferior Courts just created, as having this power, when reference is made to the old Land Court of 1783, of which this supplemental Act purports to be, both in its title and upon its face, a modification? Why do the compilers of the laws, who were cotemporary with this legislation, and who were not only lawyers, but prominent actors upon the public stage at that period, make no allusion to this transfer of jurisdiction in 1789, to the Inferior Courts? Why does the Legislature, itself, in the supplemental Act, omit any mention of it?

There is another important view of this question, whether we look to the Judiciary Acts before 1797, or to the Act of that year which repeals all the preceding Acts, which regulated the Judiciary Department of the Government, or the Act of 1799, which repeals all of the Acts of 1797, except from the 67th section and onward; relating exclusively to Justices of the Peace, we shall search in vain for the grant of jurisdiction claimed for the Inferior Courts upon the matter in controversy.

I say it respectfully—it is nevertheless true—that but for the fact that *five* or more Justices, one of them being an assistant Justice, constituted the Land Court, under the Act of August, 1783, and *five* compose the bench of the Inferior Court, proper, as at present established, the jurisdiction exercised by the former, never, I apprehend, would have been claimed or used by the latter tribunal.

Again, in 1842, doubts arose as to who was to officiate as

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Clerk of the Land Court. No such doubt could have been entertained had the Inferior Court constituted the Land Court *exclusively*. Of course, in that case, their Clerk would have served; yet, we find the General Assembly of that year declaring that the Clerk of the Inferior Court should be the Clerk of "the Land Court of the county"—not the Land Courts, as of many or more than one; but the definite article is used—the Land Court. (*New Digest*, §79.) Had the jurisdiction been concurrent even, the phraseology would have been "the Land Court held by the Justices of the Peace." But the Legislature understood there was but one Land Court; and such is our understanding.

And while we do not doubt, for a moment, either the experience or the information of our learned brother, as to the practice in the Middle Circuit or elsewhere, we are constrained to say that it is without authority of law.

Since delivering this opinion, I have learned that a practice similar to that which has obtained in the Middle Circuit, existed formerly in the Western Circuit and in one of the counties of the Northern Circuit, but that in both it had been overruled upon solemn argument. We feel quite certain the practice never did prevail, generally, over the State; otherwise, we should be reluctant to overturn it, however contrary to our construction of the law. We do not aspire to the reputation of even *Judicial reformers*—even, much less, *revolutionists*. We are content to administer, in good faith, not only the laws as we find them written, but whenever we can, as they were interpreted by our forefathers of old, of ever blessed memory.

We would not be understood as holding that a grant issued upon a warrant emanating from the Inferior Court would, for that reason, alone, be invalid. Our judgment is, that it is incompetent for that body of Magistrates to issue such a warrant; and that it should be quashed, provided proceedings are instituted in due time, as in the present instance, to arrest it. Judgment affirmed.

No. 59.—CHARLES E. TAYLOR, plaintiff in error, vs. HECTOR BUCHAN et al. defendants.

[1.] A demurrer will lie to a bill which has in it no equity.

In Equity, in Washington Superior Court. Decision by Judge Holt, September Term, 1854.

Hector Buchan and Wm. O. Franklin, as judgment creditors of Morgan Brown, for themselves and other judgment creditors, filed their bill against Charles E. Taylor and the Sheriff, setting forth, that certain negroes of Brown having been levied on by certain *f. fas.* and a claim having been interposed by Taylor, that the claimant and the levying creditors (the claim still pending) by mutual consent, took an order of the Court, that the Sheriff should sell the negroes on twelve months credit, and that the fund should abide the decision of the claim case, and by the same order the claim case was referred to the decision of arbitrators.

The Sheriff proceeded, under the rule, to advertise and sell the negroes as the property of Morgan Brown, on twelve months credit; and the arbitrators awarded that the fund should be divided, one half to the claimant, and the other half to be subject to distribution, by the Court, among the judgment creditors of Brown, and this award was made the judgment of the Court. The claimant, at the expiration of twelve months, moved a rule against the Sheriff for his half of the money; and the complainants in this bill (who were judgment creditors of Brown, but not parties to the above mentioned proceedings) filed this bill, asking an injunction against Taylor, and that the whole fund might be distributed among the judgment creditors.

To this bill a demurrer was filed for want of equity generally, and because the complainants had an adequate Common Law remedy.

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The demurrer was over-ruled by the Court, and this decision is assigned as error.

L. STEPHENS, for plaintiff in error.

SCHLEY & ROCKWELL, for defendants.

By the Court.—BENNING, J. delivering the opinion.

[1.] The money in the hands of the Sheriff either belonged to Morgan Brown, the defendant in the judgments, or it did not. If it belonged to him, as first we will assume it to have done, then it was a fund with which all of the parties to the bill were in *legal communication*. It was a fund which any of them might get at by a *rule* against the Sheriff.

These parties, considered in classes, were first, the claimant in the claim case; secondly, those judgment creditors, who, with the claimant were parties to the consent order for the sale of the negroes, and to the order making the award the judgment of the Court; thirdly, the other judgment creditors.

As to the claimant, the consent order for sale and the award made the judgment of the Court, put him in legal communication with the money, and gave him the right to demand it by a rule against the Sheriff.

As to the judgment creditors who were parties to this order and judgment, adopting the award, they, for the same reason, might have demanded the money by a rule. Besides, they had their judgment heirs.

As to the other judgment creditors, those who were no parties to the order of sale and to the judgment adopting the award, they might have demanded the money by a rule; because, on the supposition on which we are now going, the money was the money of Morgan Brown, the defendant in their judgments, and therefore their judgments had a lien on it. A judgment has a lien on all of the "property" of the defendant—and money is property. Nay more, "all judgments obtained in the Superior, Inferior or Justice's Courts of this State, shall

be entitled to the right or claim of any money received by the Sheriffs, Coroners or Constables, agreeable to the date of such judgment or judgments." *Act of 1810 (Pr. Dig. 435.)* The Act does not restrict the right to money "*received*" in any particular way. The right which the Act gives is to "*any money received.*"

These latter judgments, then, had also the right to a rule for this money. So all the parties to the bill had the right to a rule.

A rule, if taken by any of them, would have been an adequate remedy. If taken by any one of them, the Sheriff would probably have stated as a reason why he ought not to pay the money to that particular one, the existence of all the facts which are stated in this bill—on this answer, whether it should be admitted to be true in point of fact, or be traversed, all the questions involved in the bill would be *well*, and *speedily*, and *cheaply* decided. That is decided as between the Sheriff and the party bringing the rule—and that, practically, would be a decision as to all the parties concerned, for the rest would find it to their interest to govern themselves by the decision; and indeed, would probably, beforehand, agree that the decision in the one case should be made the decision in all. Besides, as the decision, although made in but a single case would have, almost of necessity, to cover the ground occupied by all the cases; and it would be a pretty safe guide, if not a law to the Sheriff, as to what he ought to do in the other cases. And it is the Sheriff that is most concerned to know how to apply this money.

But, in truth, what reason is there why the claimants on the fund should not join in the rule and make one case of it? There is no reason which will allow them to join in *Equity*, which will not equally as well allow them to join in a rule. In *Equity*, one creditor cannot *force* another to join him in a creditor's bill. If one creditor files a creditor's bill, that will not prevent another and another from filing a similar bill. Every creditor may have such a bill going on at the same time. And the *defendant* cannot prevent it, at least not until after a de-

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ores has been rendered in some one of the bills. (*Stor. Eq. Sec's 545-6-9.*) If, therefore, more creditors than one join in a suit in Equity, it is because they *consent* among themselves to join. But the same sort of consent may exist as to a rule. And a rule can get along as well at the suit of *joint parties* as can a bill. If, therefore, consent is a good foundation for a joint bill in Equity, why is it not equally so for a rule? I know of no reason. The Statute of 1840 expressly gives "liberty to traverse the truth of the return or showing", and directs that "upon such traverse an issue shall be formed and tried by a Jury, as in the case of other traverses." (*Cobb's Dig. 579.*) What more than this can be done on a suit in Equity?

And, indeed, the *practice* is for all parties interested in the fund to make themselves, in some way, parties to the rule—so that, practically, a single rule settles all questions.

It appears, then, that every object which the complainants can accomplish by this bill, they could equally as well accomplish by a rule against the Sheriff. And this appearing, it appears that the complainants have a remedy at Law, and therefore have no equity in their case.

This is the conclusion to which two of the Court, Judge LUMPKIN and myself come—and the reason for that conclusion, Judge LUMPKIN and I think that there is an adequate remedy at Law, viz: a rule.

Judge STARNES comes to the same conclusion, but for a different reason. He thinks that there is no equity in the bill, but he thinks so because, in his opinion, the bill is defectively framed.

I will add, for myself, that as to *creditors' bills under the laws of Georgia*, I find a very great difficulty in getting a ground upon which they can rest at all; and that even under the law of England, as I understand it, they only lie in cases in which the debtor is an *executor* or *administrator*.

This is the result, supposing the money in the Sheriff's hands to belong to Morgan Brown, the defendant. If it does not belong to him, the *creditors*, it is true, could not reach it by a rule, but neither can they by this or any bill in Equity.

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If a part belongs not to him, but to the claimant in the claim case, yet *the latter* may reach that part by a rule.

And the question, whom the money does belong to—the question, whom the money ought to be paid to—are questions of Law, and may as well be decided on a rule at Law as on a bill in Equity.

So there is no equity in the bill, and the demurrer should have been sustained.

To this conclusion come the whole—a part for one reason, the other part for another.

No. 80.—DANIEL HARRIS, administrator, &c. plaintiff in error, vs. WILLIAM SMITH, executor, defendant.

[1.] A testator gave real and personal estate to D F H, with the provision that if he should die leaving no lawful heirs, then, in that case, it is my will that all of the said property shall be divided, share and share alike, between the children of J C F. *Held*, that these words vested in D F H an estate in fee, subject to an executory devise of the lands, and bequest of the personal property in favor of the children of J C F, if the said D F H should die without children living at the time of his death.

In Equity, in Washington Superior Court. Decision by Judge HOLT.

In 1840, Cordal N. Francis made his will and died, leaving defendant, Smith, his executor, and his wife Nancy and his grand-son Daniel F. Harris, him surviving.

By his will he disposed of a large estate to his children, grand-children and others. By the first and fourth items of that will he devised as follows:

"*Item 1st.* It is my will and desire, and by these presents

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I do give in trust to my beloved wife, Nancy Francis, during her life-time and widowhood, all those tracts or parcels of land lying on the south prong of Williamson Swamp, in the County of Washington and State of Georgia, this being lands which I purchased of the Perrys, John Davis, Lewis Davis, and Elias Lee, containing about nine hundred and twenty two acres, be the same more or less, adjoining lands of James Gainer, Charles Sheppard, Anderson Riddle, and Mrs. Doolission Davis. Also all the stock of horses, cattle, sheep, hogs and provisions of every description, together with all the plantation utensils, of every kind, that may be on said plantation of mine, at the time of my decease, together with a read-wagon and harness, one ox-cart, one pair of oxen; also one still, to be taken from the plantation whereon I am now living. And it is also my will and desire that my executor, hereafter named in this my last will and testament, shall cause to be built, as early as practicable after my decease, on the above-named tract of land, a dwelling house for the use of my wife Nancy, during her lifetime and widowhood, and for which I hereby appropriate one thousand dollars for that purpose; but I want it particularly understood by my executors, that it is my wish and desire that my beloved wife is not to be turned out of the house she is occupying, but she is to have the entire use of it until the other house is completed and ready for her reception. Also, I loan the use of the following slaves, to-wit: Solomon, big Harry, Hannah, Nat, Nelly, Creasy, Lucy, Betty, Matilda, Sam, little Sarah, Sterling, Newton and Joe. All the mentioned property in this item, first is loaned or given to my beloved wife, as above stated, during her lifetime and widowhood, and after her death or marriage; then in either case, the said property to be given as I shall hereafter direct in this my last will and testament.

Item 4th. It is my will and desire, and by these presents, to give unto my beloved grand-son, Daniel F. Harris, after the death or marriage of my beloved wife, all the property in which I have loaned to my wife during her natural life or widowhood, as will be seen by reference to the first item of this my last will and testament; provided, nevertheless, if my said grand-son

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should die leaving no lawful heirs, then, in that case, it is my will that all of the said property named in this item, revert back to my estate, and to be divided equally, share and share alike, between the lawful children of my son James C. Francis.

Daniel F. Harris was son of complainant's wife, who was the daughter of testator, and he died before his grand-mother Nancy, wife of testator, never having married, and leaving his father, the complainant, and several brothers and sisters him surviving, and his heirs at law. Subsequently, his grand-mother, the tenant for life, died in possession of the property, and of which Smith, defendant, took immediate possession, as executor of testator, Cordal N. Francis, and against whom this bill was filed by Mr. Harris, as administrator of his son, Daniel F. Harris, for an account and surrender of the estate, that he may distribute it among the next of kin of his intestate, in whom an unconditional fee-simple vested, as he contends, by the laws of the land.

To this bill a general demurrer was filed, in the argument, of which two main grounds were relied on:

1st. That Daniel F. Harris having died before his grand-mother, he took no interest under the will; that the testator only willed him to have the property if he survived her, but made no direct bequest; and as he did not survive her he took nothing—no interest vested.

2nd. If any interest did vest, the same was subject to a reversion, dependent on his dying without children; that as such contingency happened, the reversion took effect, and the estate went back to the ultimate remainder-men, the children of James C. Francis.

The Court sustained the demurrer and dismissed the bill; and on this decision error is assigned.

BAILEY; SCHLEY, for plaintiff in error.

ROCKWELL, for defendant.

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By the Court.—STARNES, J. delivering the opinion. . . .

[1.] It is insisted for the plaintiff in error, that in the disposition which this testator must be held to have made of the property, by the *fourth clause* of his will bequeathed, he intended to give the same, after the estate in his wife should terminate, to his grand-son, Daniel F. Harris, in fee tail. That such intention is, in legal contemplation, manifested by the use of words in the latter part of that clause, which have reference to an indefinite failure of issue in the line of that grand-son's posterity, and which thus bring the case within the rule against perpetuities. That, as a consequence, by virtue of the first section in our Act of 1821, an absolute, unconditional fee-simple vested in Daniel F. Harris; and his administrator is entitled to recover the property from the defendant in error. . . .

The first part of this fourth clause gives the property specified, after the death or marriage of the testator's wife, to his grand-son; and the second part is in the words following: "Provided, nevertheless, if my said grand-son should die, leaving no lawful heirs, then, in that case, it is my will that all of the said property named in this item shall revert back to my estate and be divided, share and share alike, between the lawful children of my son, James C. Francis".

We propose to consider, first, the effect and value of the words, "if my said grand-son should die, leaving no lawful heirs"; for these are the words which, it is argued, import an intention to create a perpetuity.

Touching such expressions as "dying without issue", or "in default of issue or heirs", or "having no issue," &c. the settled construction, in the Courts of England, for a great length of time has been, that they import an *indefinite failure of issue*. But in conveyances of personal property, where the words are "dying without *leaving* issue", the word "*leaving*", by an equally well settled construction, has been held to modify the other expressions, so that they mean a dying without issue at the death.

It is urged, however, for the plaintiff in error, that the first section of our Statute of 1821, in effect, repeals this liberal construction, as to personal property, in our State, and puts it on the same footing with real property, in this respect; that the true meaning of this section is, that though the conveyance be of personal property, yet if it be expressed in such terms, as by the Statute *De Donis, f.c.* would create an estate tail in real property, the same construction must be applied as if the conveyance were of real estate in England; and that by the terms of our Statute, an absolute fee-simple will vest in the first taker.

We will waive a consideration of this point, and admit, for this investigation, that it is maintainable, inasmuch as there is real estate conveyed by the words of this will, and it became necessary for us to consider them with reference to such conveyance; and inasmuch as such consideration has strongly inclined our minds to the opinion, that in our State, the rule of construction which has been applied by the English Courts to such words, even as to real estate, should not be supported.

We are aware that the proposition is a bold one—that from the time of the Yeas Books to the present day, the construction has been different in England, and that the Courts in the United States, generally, have followed those decisions. We are not without that deep reverence for case and precedent which marks our profession, and manifests the careful and cautious spirit in which those should always proceed, whose vocation it is to administer human laws. And we are properly mindful that titles are endangered when precedent is recklessly disregarded; yet, after much thought and labor, we have been unable to take any other satisfactory view of this subject, as it presents itself under our system of laws.

To come at once to the point: Let us admit that our Act of 1821 holds us to the Statute of Westminster, commonly called *De Donis, f.c.* as the touchstone of those terms which shall constitute, or pass an estate tail. And the more advantageously to consider this subject, let us look to some features in the history of that Statute. That history bears fruitful evidence

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to the struggle which has so long been going on between what is rightly called "the true policy of the Common Law", and the baronial or feudal system.

It was the policy of the feudal lords to convey lands by way of *conditional fee*, or so as to restrain that fee to a particular class of heirs; and in default of such heirs, to provide that the same should revert to the grantor, where it could be made still to subserve feudal purposes. In opposition to this policy of the barons, such a conveyance was construed, at Common Law, to be a fee-simple, on condition that the grantee should have the heirs prescribed; and if the grantee died without such issue, the land reverted to the grantor: but if he had the specified issue, the condition was held to be performed—the estate became absolute, and the grantee could alien the land to the exclusion of his own issue. To defeat this construction and contrivance of the Courts, the feudal lords passed, or caused to be passed, the Statute 13 *Edw. 1, c. I.* which is known as the Statute of *Westminster Second*, or *De Donis Conditionalibus*.

This Statute declares, that where land is given "to (1.) any man and his wife, and to the heirs begotten of the bodies of the same, with such condition expressed, that if the same man and his wife die without heirs of their body, the land so given shall revert to the giver or his heir. (2.) In case, also, where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expressed in the deed of gift, that if the husband and wife die without heir of their bodies begotten, the land so given shall revert to the giver or his heir. (3.) In case, also, where one giveth land to another, and the heirs of his body issuing, it seemeth very hard, and yet seemeth to the givers and their heirs that their will being expressed in the gift, was not heretofore, nor yet is observed. (4.) In all the cases aforesaid, after issue begotten and born between them, (to whom the lands were given under such condition,) heretofore, such feoffees had power to alien the land so given, and to disinherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift. (5.)

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And further, when the issue of such feoffee is failing, the land so given ought to return to the giver or his heir, by form of the gift expressed in the deed, though the issue (if any were) had died: (6.) Yet, by the deed and feoffment of them, (to whom the land was so given upon condition) the donors have heretofore been barred of their reversion, which was directly repugnant to the form of the gift: Wherefore, our Lord the King, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained that the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed, so that they to whom the land was given under such condition, shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it was given, after their death, or shall revert to the grantor or his heirs, if issue fail, (in that there is no issue at all) or if any issue be and fail by death, or heir of the body of such issue failing, &c. (1 *Ruffh. Stat. at L.* 78.)

In order that it may plainly appear that the signification of such words as "dying without issue or heirs," &c. which has prevailed in the Courts of England, is the result of construction, and not of the accurate terms of this Statute, I call attention to its several provisions, which I have for this purpose set forth at large. 1. Reference is made to the case, where land is given to any man and his wife, and to the heirs begotten of the bodies of the same man and his wife, with condition that if the same man and his wife die without heirs of their bodies *between them, the same man and woman, begotten*, the land so given shall revert to the giver or his heir. 2. Where land is given in free marriage, &c. with condition annexed, that if husband and wife die without heirs of their bodies begotten, the land so given shall revert to the giver, &c. 3. Where one giveth land to another and the heirs of his body issuing. 4. In such cases, after issue begotten and born between them, to whom the lands were given upon condition, the feoffees had power, heretofore, to disinherit their issue, contrary to the minds of the givers, &c. 5. And further, when the issue of

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such feoffee has failed, (*deficiente exitu*) the land ought to return to the giver by the form of the gift; yet, by the deed of the donee, the donors have heretofore been barred of the reversion: Wherefore, it was enacted, that the will of the giver, manifestly expressed, should be henceforth observed, so that the land thus given should remain unto the issue of them to whom it was given, after their death, or revert to the giver or his heirs, *if issue fail, where that there is no issue at all, (per hoc quod nullus sit exitus omnino,) or if any issue be and fail by death; or heir of the body of such issue failing.* . . .

We thus see, that there is nothing in the Statute which sanctions the idea, that when one was said to *die without issue or heirs*, reference was had to a failure of issue at any remote time after his death. On the contrary, wherever, therein, reference is made to a dying without issue or heirs, the Statute clearly shows that it is intended as a reference to such failure, *at the death*; and as if to make it very plain, that the words used were intended to be employed only in their natural signification, in the last clause which I have just given and emphasized, the two things, viz: a failure of issue at the death of the ancestor, and a remote or indefinite failure are brought into immediate juxtaposition, and carefully expressed in the first by the words: "*if issue fail, (where that there is no issue at all) or if issue be, and fail by death,*" and the second by the words: "*or heir of the body of such issue failing*."

As if the Courts were at intervals swayed from side to side, in the contest to which we have referred, between the feudal policy and the credit and commerce of the Kingdom, we find them, after having, by their strong proclivity in favor of the policy of unfettering estates, compelled the barons to resort to this Statute next inclining towards the feudal influences, and adopting an artificial construction of words for the purpose of bringing them within the terms of this Statute. Again, we find them favoring the principles of the Common Law, and the interests of commerce, and resorting even to slight expressions in the instrument before them, for the purpose of holding, that

these modify the strong signification of words referring to a particular class of heirs; or an indefinite failure of issue.

And we may remark in passing; that it is in this very condition of influences, that that thick mist of conflicting opinions and confusion of ideas, which hovers over the current of cases in which the rule in Shelly's case has been discussed, has its origin.

As we have said, there can be no doubt that the construction placed by the Courts upon such words as those used in this will, viz: "should he die leaving no lawful heirs", from a very early period, has been that in conveyances of real estate, they imported an indefinite failure of issue. It may be doubted, whether or not this was the construction first applied, yet the Year Books seem to show, that at a period not very remote from the passage of the Statute *De Donis*, this construction was adopted. Still it is but a construction of the Courts. It is not the natural, legitimate and idiomatic signification of the words. It is not what the Statute speaks, but what the English Courts have said the Statute speaks. We have ascertained this for ourselves, by a critical examination of the Statute; but to the point we have the testimony of the most eminent English Lawyers and Judges.

Lord Macclesfield tells us, for example, in the case of *Pinberry vs. Elkin* (1 P. Wm. 568,) "by the third sense of a person's *dying without issue*, is intended *without leaving issue at the time of his death*, and in this sense the words (dying without issue) shall be taken in the principal case; which indeed seem to be the natural meaning of these words".

Mr. Jarman says, that "in ordinary language, when a testator gives an estate to a person and his heirs with a limitation over, in case of his *dying without issue*, he means that the devise, shall retain the estate, if he leaves issue surviving him". But he goes on to say, that the legal or constructive meaning is different". (2 Jarm. on W. 316.)

Mr. Lewis in his excellent treatise on *Perpetuities*, informs us, that "although such is the legal construction of the words

'dying without issue', unaccompanied by any restrictive expressions or circumstances, there can be no question, that according to the common and ordinary idiom and construction of the English language, independent of any technical rules, which have been applied to the interpretation of legal instruments, those words imply a failure of issue living at the time of the death of the ancestor''.

In the case of *Attorney General vs. Hird*, (1 Brow. C. 170) where the words were, "to B. and the lawful heirs of his body, if he should have any, but if he should die without lawful heirs to Lady S.," Lord *Thurlow*, following the rules of construction in England, and feeling himself bound by them, decided that the limitation over was too remote, but he added, "I am sorry that the Judges have thought themselves bound to construe wills contrary to their own opinions of the intent. The words, if construed here, otherwise than they have usually been, would overturn the rules of construction, though not the rules of law." Here, it will be observed, is a frank and bold admission, that this construction was not demanded by the law, that is, by the terms of the Statute *De Donis, &c.*

While reviewing the decisions on this point, we find, that in some cases, where the same words in the same instrument, as to the real estate therein conveyed, have been held to import an indefinite failure of issue, so far as the personal estate was concerned, they have been held to import a failure of issue, at the death of the ancestor. For example, where the words are 'dying without leaving issue,' there, since the case of *Forth vs. Chapman*, (1 P. Wm. 663,) it has been the settled doctrine, that the word "leaving," so modifies the expression, that applied to personal estate, it imports a failure of issue at the death, even where the real and personal estate is comprised in the same gift. And this rule is sustained by a long train of decisions. (See the cases cited at 2 Jarm. 419.) But how is it possible that this double meaning—this esoteric and exoteric signification, as it were, can belong to the same terms of the same law? This cannot be reconciled with reason; and hence, as Lord *Thurlow* says, the legal or conventional signification

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of such words depends, rather on "the rules of construction," than "the rules of law".

We find, too, that in some cases, the Courts have endeavored to avoid a signification so opposed to the plain meaning and intention of the giver, even where such words have been applied to real estate, and have anxiously cast about for the slightest expressions on which they might seize, as a pretence for a different construction. We may take as an illustration of these, the case of *Porter vs. Bradley*, (3 T. R. 143,) where the words were, if he "shall happen to die, leaving no issue behind him". There, Lord *Kenyon* availed himself of the words, "behind him," as modifying the expression and affording a reason for a different construction; as if one could die, *leaving issue*, in any reasonable sense of the term, without leaving them *behind him*. So, in the recent case *Ex parte Davies in re The W. S. & W. Railway Co.* (9 Eng. L. & Eq. R. 88,) where a testator gave property, both real and personal, to his son, and in case his son should die without leaving any lawful issue of his body, the freehold should, *at his death*, be divided and go to another son and daughter. Here the words, *at his death*, were held to qualify the other expressions, and to show that the testator had reference to a dying without issue, at the time of the son's death.

Though all this be true, we admit that this legal construction, as a principle well settled by adjudications in England at the time of our adopting Statute, is binding on us, unless it has been repealed. But we have taken some pains to show, that this rule was the result of construction, and not language of the Statute *De Donis*, because, it seems to us, that as such, it has been repealed in our State.

To show this, we must ascertain the reason for the rule. It will not be difficult to do so. It must spring, of course, from the same source out of which arise the *entail* and the *perpetuity*. Its remote ancestry was of *feudal pedigree*, its immediate progenitors, the interests of the *heir at law*. We find this to be so, wherever we look to the history of this question. What Mr. *Lewis* says on this subject, however, will suffice for

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our purpose, viz: that "in every case of a limitation of real estate, after or upon the failure of issue of a person (whether taking a prior estate or not) the law leans to the construction of a *general or indefinite failure*, as opposed to one limited to happen within a particular time. And the reason assigned for this inclination is, that in all cases of doubt in regard to the construction of limitations, that is to be preferred which most favors the interests of the heir at law." (*Lewis on P.* 191.)

But in our State, primogeniture has been abolished, and there is technically no heir at law—real and personal estate, for purposes of distribution, have been placed upon the same footing, and estates tail have been prohibited. Therefore, the reason for the conventional rule of construction which we have been considering, and on account of which these words, now under review, have been wrested from their natural meaning, has been repealed. Should not the rule fall within the reason?

It surely should, unless, as a Court sitting in Georgia for the trial of a case arising out of an instrument in this State executed, when called upon to expound the will of the maker ("the giver") "according to the form of the gift manifestly expressed," we should look to the policy and the law of England, where estates are lawful and primogeniture exists, (as serving to illustrate the meaning of the "giver", and rendering it probable that he contemplated an indefinite failure of issue) which policy and law have been changed and repealed in our State, rather than to the circumstances by which the giver was surrounded at the time the instrument was executed, as they may have been influenced by the laws of the place where he designed it to go into effect.

But should we be wrong in all that we have said, still there is another feature in the latter part of the fourth clause of the testator's will which is opposed to the idea that he contemplated an indefinite failure of issue in the line of his grand-son's posterity. It is found in the use of the words, "then in that case," &c.

The terms employed are, "provided, nevertheless, if my said grand-son should die, leaving no lawful heirs, then, in that

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case, it is my will" that the property be divided between the children of James C. Francis, &c.

Now the word *then* may be used, either as a word of reasoning or of time. When it is used in the limitation of estates, or in framing contingencies, unless something in the context makes a different meaning for it necessary, it is to be regarded as Lord *Hardwick* says in *Beauclerk vs. Dormer*, (2 *Atk.* 311,) as a word of reference: but it *may* be used on such occasions, in its grammatical sense; that is, as an adverb of time. In such case, the context should plainly show that it was so used, before effect is thus given to it. When it is employed in the former sense, it is synonymous with the phrase, "in that event"; or, "in that case"; when in the latter, with the words, "at that time". (2 *Jarm. on W.* 446.)

In the case of *Beauclerk vs. Dormer*, Lord *Hardwick* refused to consider this word in its grammatical sense, but treated it as a word of inference or reasoning, because there was nothing in the context to authorize it.

In the sentence before us, the word is plainly used as an adverb of time, because it is in immediate juxtaposition with the phrase, "in that case". To give it as here used, a different construction, would be to consider the testator using it twice, consecutively, in the same sense, or as having no meaning for it, when thus using it: whereas, if we construe it as a word of time, we represent the testator as simply saying, "if my grand-son should die, leaving no lawful heirs, *in that case, at that time*, it is my will that the property should be divided," &c. This carries every material word of the will into effect, and gives an entirely reasonable interpretation to the same. It is the duty of Courts to do this at all times, when it can be done *ut res magis valeat, &c.*

But, if the testator intended the bequest over to take effect, should his grand-son leave no lawful heirs *at the time of his death*, and had reference, consequently, to a dying without issue, *at that time living*, he could not, of course, have contemplated a perpetuity, nor have intended to create an estate tail. This

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being made plain; it is very clear that the words *lawful heirs* were employed by the testator in the sense of children.

It only remains to say, that the result of these views is, that in our opinion the testator gave to his grand-son a remainder in the real and personal estate conveyed by the first clause of his will to his wife for life, the same to be taken in fee by his said grand-son (for by the first part of the said fourth clause of the will, construed as it must be with reference to the second section of our Statute of 1821, an absolute fee simple estate vested in Daniel F. Francis), subject to an executory devise of the lands and bequest of the personalty to the children of James C. Francis, if the said Daniel F. should die without children living at the time of his death.

No. 61.—C. A. L. LAURIE, plaintiff in error, vs. THE NEW YORK AND SAVANNAH STEAMSHIP NAVIGATION COMPANY, defendants.

¶ 14. The New York and Savannah Steam Navigation Company, at some previous period, published printed rates of freight, containing amongst others, this item—*merchandise, articles not enumerated, such as boxes, &c. per foot, 12¢.* C. A. L. produced two boxes containing 1200 cotton samples, and offered to pay the freight thereon, by measure, according to the printed rates; demanded their shipment, by the Alabama, one of the Company's vessels. *Cotton samples* was not mentioned in the freight list. It was a new business which had recently sprung up; and it was proven by those who were accustomed to make shipments of these samples, that the customary rates which they were in habit of paying, was one cent per sample, which rates were known to the plaintiff. *Held*, that the Company was not bound to ship these boxes, *as such*, by measure, nor unless paid a cent a sample, the customary rates on such articles.

Case, in Chatham Superior Court. Tried before Judge FLEMING, May Term, 1854.

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This was an action brought by the plaintiff in error, against the defendant in error, as common carriers, for damages sustained by their refusal to convey two boxes from Savannah to New York.

The following is the testimony in the cause:

Testimony of C. D. Rhoad, witness for Plaintiff: Was in the employment of Mr. Lamar about the month of April, 1852; sent down to the steamship Alabama, which is one of the steamers of the defendants, who are common carriers, two boxes belonging to Mr. Lamar, to be shipped to New York; they contained Cotton samples, and are the boxes named in the declaration; they were closed up and offered as ordinary merchandise; witness saw them delivered on the wharf to one Daily, who is in the employment of the company and ships goods for them. Daily said they contained Cotton samples and he would not receive them. Witness told him that what they contained was none of his business. He still refused, and the goods were put in the ware-house. This was in the port of Savannah, and in the afternoon. Witness went down, the next morning, with Mr. Lamar to the wharf; they required the goods to be shipped, took out his purse and offered to pay the usual rates of freight for merchandise; Witness thinks it was 12 1/2 cents per foot. Daily refused to receive it. While they were discussing the question, Captain Laddow, the master of the steamship Alabama, came down and said to Mr. Lamar, I have arranged the matter with the agents, we will take the goods on your terms. Witness saw the goods put on board the Alabama; and a short time after saw them taken off and put in the ware-house. They were not carried by the Alabama. Mr. Lamar was obliged to have them brought back in a dray to his office, and afterwards to another vessel—they were previously sent by him in his own conveyance to the Alabama. It cost about a dollar for the drays, 50 cents each time, and it was worth as much to take them in his own conveyance. I estimate the damage at that amount to him. I know of no other special damage.

The rates demanded for Cotton samples by the boat were one

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cent per sample. I heard of this and believe it to have been so for a short time previous. I do not know of my own knowledge. With the Philadelphia steamships I am acquainted; they charge nothing for samples. Samples are usually sent put up in paper or in baskets; they go in the Purser's room. They require more care than ordinary merchandise. These boxes did contain about 2200 samples. They were not shipped as samples, but as ordinary merchandise. Padelford, Fay & Co. are the agents of the defendants. They usually engage the freights. Mr. Charles S. Arnold is one of the firm. Mr. Arnold called on Mr. Lamar in my presence on the morning I speak of and offered to take the boxes for ten dollars. Mr. Lamar offered the usual rates of freight and would pay no more. The samples were intended to be sent to Europe from New York. Mr. Lamar was willing to pay by the printed rates and offered to do so.

Testimony of Daily; for defence: Was in the employment of the defendants and on the wharf when the boxes came down. I refused to receive them, saying they contained cotton samples, unless a certificate of the number of samples was sent down and the money pre-paid. It is the custom of the company to have samples pre-paid, and had been for some time previous. I do not know how long Mr. Rhind called out to me and said it was none of my business what was in the boxes. I told him it was and I would not receive them. It was not my business to collect freights. The boxes were left on the wharf and by a mistake of the Stevedore were put on board the Alabama, but were taken off that night and put in the warehouse. This was in the afternoon of the day the goods came down. The vessel was to sail the next day. Do not know any thing of Captain Ludlow's conversation with Mr. Lamar.

Charles S. Arnold, sworn for defence: I am one of the firm of Padelford, Fay & Co., and was at the time. We were then and are now the agents of the company in Savannah. The freight for cotton samples was one cent per sample. This rate had been established for some time. It was not so originally. We did so in order that those who shipped cotton by our

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steamers should have an advantage over those who shipped by sailing vessels. We charge nothing for samples when the bales are shipped, but it has become a habit to send samples by the steamer, of cotton on board sailing vessels, which can thus be sold, to arrive, and complete with that on board steamers. This is a new business. It had sprung up within a year or two. After we were informed that Mr. Lamar had sent the boxes down and what they contained, I met him in the evening about 6 o'clock and told him he could not send them without paying for them as samples. The next day, after a conversation with my co-partners, I called upon him and offered to take them for ten dollars. He offered to pay the usual rates of merchandise per foot and no more. I told him the goods could not go. We usually charged from 12 to 15 cents a foot for merchandise. Mr. Rhind was present. Cotton samples have no peculiar intrinsic value, their value is connected with the sales spoken of. I offered the ten dollars in a spirit of conciliation. I thought it probable that the boxes contained about 1000 samples. I know nothing of the conversation with Captain Ludlow. He was not authorized to receive freight, the agents make all contracts for freight. [Here a set of printed rates were shown to witness and are to be taken with this testimony.] These are the rates spoken of. They are the rates from New York to Savannah, and not from Savannah to New York. We have no regular rates from Savannah. The articles on that but come this way, they scarcely ever go back. Those rates have been published by authority and have been circulated here, but they do not regulate the freight from Savannah to New York. If a box of ordinary merchandise were sent we should probably charge those rates. If small articles were sent down to the steamer, I suppose the Captain would receive them and we would take the freight, but he has no right to make engagements for freight; for instance, he could not take a lot of five barrels. (Witness subsequently explained that he used the term five barrels simply as an illustration.) There had been disputes about paying the one cent per sample for some time in

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N. York, as the merchants refused to pay it, and we wrote to the president about it. That letter is his reply.

Contents of letter, December 9, 1851. I would charge one cent per sample for cottons, always "prepaid". We had been charging these rates for some time, but as there were disputes with the merchants in New York about it, we wanted the authority of the president.

Mr. Dana, Mr. Harper, and Mr. Mitchel, merchants accustomed to the business, were sworn for defence, to prove that they were in the habit of paying one cent per sample. Mr. Mitchel referred to a note made by himself, to show that on the various occasions, beginning December 20th, 1853, he had paid the rate. He had not looked further back. The witnesses could not say how long the rates had been established. The sending cotton samples was a new business. The rates were not demanded when the Cherokee and Tennessee began to run in 1849. They were demanded by the new boats, Alabama and Florida. Mr. Dana swore that in his business (the sailing vessel line,) he made the contracts for freight, that the master did not contract, but if he received goods they would be sent and freight demanded. The reason why the masters here in their employment do not contract, is because they usually fill up the vessels. As agents, the master has the right to take goods on freight. Mr. Harper swore that he never applied to the agents to take the cotton samples, he sent them frequently and always directly to the steamer herself with the money.

C. D. Rhind recalled, swore: That he knows nothing of the boxes being sent on board the evening they went down to the wharf before the vessel sailed and again taken off; dares say it was done as Mr. Daily says so; but saw them sent on board and put there after Captain Ludlow's conversation with Mr. Lamar, on the morning she sailed, and saw them taken off that morning. The steamer left in the morning. Mr. Lamar's conversation with the Captain was after that with Mr. Arnold in witness' presence.

The printed list of rates above referred to is as follows:

ESTABLISHED RATES OF FREIGHT BETWEEN N.
YORK AND SAVANNAH, BY THE STEAMSHIPS
FLORIDA AND ALABAMA.

Anchors, per lb.	$\frac{1}{2}$ ct.
Ashes, pot and pearl, per lb.	$\frac{1}{2}$
Bags, corn and other grain, per bushel,	10
Pimento, per bag,	40
Pepper, “	25
Ginger, “	25
Trace chains and the like, per lb.	$\frac{1}{2}$
Butter, kegs, tubs or other packages, per lb.	$\frac{1}{2}$
Barrels, beef, pork, fish, beer, cider, salt, pitch, tar,	
turpentine, rosin, plaster paris, cement,	62 $\frac{1}{2}$
Potatoes, apples, nuts, bread, flour and other light	
goods in flour barrels,	50
Half barrels, beef, pork, fish, beer and tongues,	37 $\frac{1}{2}$
Flour, bread, buckwheat and crackers,	30
Quarter barrels, do do	15
Eighth barrels, do do	10
Boxes, lemons and oranges, each	50
Soap,	20
Candles, chocolate, olives, anchovies, vermicelli,	
pipes, macaroni, starch, pepper, almonds,	15
Herrings, raisins and prunes, each	10
Segars, quarter boxes, each	12 $\frac{1}{2}$
Axes, one dozen,	25
Window glass, 50 feet, each	10
Wine, oil, cordial, 1 doz each	25
Baskets, champagne (or boxes) each	50
Bellows, 30 inches or under, each	75
Over 30 inches,	1 00
Brick, tile, slate, &c. per 1000,	10 00
Bundles, frying pans, shovels, scythe blades, 1 doz	
each	50
Straw knives, rice hooks, 1 doz each	20

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Brooms, broom handles, per doz	25
Clothes brooms, hearth brushes, per doz	15
Cart wheels, each	1 50
Coach and chair wheels, each	50
Carboys, aqua fortis and oil vitriol, on deck, each	1 25
Carriages, four-wheel coaches and standing top barouches, each	20 00
do without dicky seat,	15 00
Buggies and buggy wagons, each	10 00
Falling top barouches and phaetons, each	12 00
Gigs, sulkeys, wagons without tops,	6 00
Stages on deck,	20 00
Under deck, each	25 00
Ox carts, each	10 00
Single horse carts, each	6 00
Chests, tea, each	50
Half chests, each	30
13 lb. boxes,	15
6 lb. do	10
Coffee, bags, barrels or casks, per lb.	$\frac{1}{2}$
Cheese, casks or boxes, per lb.	$\frac{1}{2}$
Copper, in cases or loose, per lb.	$\frac{1}{2}$
Collars, per doz	40
Cultivators and corn shellers, each	75
Chairs, usual sizes, per doz	8 50
Fancy chairs, in boxes, per foot,	10
Demijohns, empty, 3, 4 and 5 gallon, each per gal.	08
Filled, each per gal.	10
Drums, figs or raisins,	10
Half drums,	06
Hams, loose, each	10
In casks, barrels or boxes, per lb.	$\frac{1}{2}$
Hogheads or casks, copperas, sugar, coal,	$\frac{1}{2}$
Horses or mules, on deck, shipper to find feed and stalls, each	25 00
Horned cattle, do do	20 00
Iron, bars, pigs, castings or hollow ware, of all des-	

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criptions not otherwise mentioned, wire, cannon,	
cannon balls, chain cables, graplins, chests, rail-	
ings, shear moulds, sheet iron, anvils, smoothing	
irons, rail-roadwheels, per lb.	$\frac{1}{2}$
Jack screws, each	75
Jars, grapes, large, 60c.—small, 40c.	
Snuff, 50 30	
Kitts, salmon or other fish, each	25
Lead, sheet in rolls, pigs or bars, per lb.	$\frac{1}{2}$
Lard, kegs or barrels, per lb.	$\frac{1}{2}$
Leather, sole, per side,	10
Liquors, barrels or casks, per gal.	24
Marble or stone, dressed or rough, per foot,	10
Millstones, per lb.	$\frac{1}{2}$
Nails, per keg,	25
Paper,	
Printing, per ream,	31 $\frac{1}{2}$
Sheathing, per lb.	$\frac{1}{2}$
Plaster Paris, in bulk, per lb.	$\frac{1}{2}$
Paint, dry or in oil,	$\frac{1}{2}$
Ploughs, all sizes, each	1 00
Portable furnaces,	25
Quicksilver, each flask,	1 00
Rocking chairs, each chair,	1 00
Steel, bars or bundles, per lb.	$\frac{1}{2}$
Salt, in sacks or casks, per bushel,	10
Still, copper or iron, per gal.	65
Worms for stills, per foot,	10
Shot, per lb.	$\frac{1}{2}$
Saws, saw-mill and cross-cut saws, per doz.	1 00
Stone Ware, per gallon, if loose,	04
In crates or casks, per foot,	10
Straw cutters, framed, each	1 00
Specie, gold or silver,	$\frac{1}{2}$ to $\frac{1}{2}$ p.c.
Tin plates or pigs, per lb.	$\frac{1}{2}$
Tobacco, kegs, casks or boxes, per lb.	$\frac{1}{2}$
Measurement articles not enumerated above, such	

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as boxes, bales, trunks, dry casks, crates, ham-	
pers, bale rope, cordage, band boxes, sieves,	
bundles leather, matting, stoves and stove pipes,	
sacks or crates, bottles, nests of tubs, pails or	
other wooden ware, baskets, bags of almonds,	
nuts, corks, pine-apple cheese, fruit trees and	
shrubbery, cotton bagging, duck, willow ware,	
porter in casks, per foot,	12½
Vices, each	20

☞ If extra valuable packages are shipped, the value must be declared and paid for accordingly, to hold the ship responsible.

☞ Shipments of specie must, in all cases, be made known at the office of the agent, before going on board.

☞ Not accountable for goods shipped, when bills of lading have not been obtained.

☞ Small single packages charged according to value.

☞ Goods will be landed on arrival, and if not taken away, will be stored at the risk of the consignee.

☞ The weight of all articles shipped by weight, to be furnished by the shippers, before the bills of lading are signed.

☞ Not accountable for rust on iron, steel, wire or hollow ware; nor breakage of stone ware, glass, marble, curb and free stone, or hollow ware castings.

☞ No bill of lading to be signed less than 75 cents freight.

☞ All bills of lading signed by the clerk on board.

For freight or passage, apply to

SAMUEL L. MITCHELL, 194 Front-st. N. Y.

PADELFORD, FAY & CO. Savannah.

And thereupon, the Court charged the Jury, as is hereinafter stated in the decision of his Honor. And the plaintiff, by his Counsel, further asked his Honor to charge, that notice of any variation of the general rule, that the master was entitled to make contracts for freight, must be brought home to plaintiffs, before his rights could be affected by such variation, and

his Honor refused so to charge; to which charge and refuse so to charge, the said plaintiff, by his Attorney, excepted.

The Jury, under the charge of his Honor, rendered a verdict for the defendant; whereupon, Counsel, during the said term, and before the adjournment thereof, for the plaintiff, moved for a new trial on the following grounds:

1st. That the verdict is contrary to law.

2d. That the verdict is contrary to evidence.

3d. Because his Honor, the Judge, erred in charging the Jury, that if the defendant was in the habit of charging one cent per sample for the freight of cotton samples, that the plaintiff was bound to tender the one cent per sample, before defendant could be obliged to accept the boxes in plaintiff's declaration, mentioned as freight, although the printed and published rates of freight issued by the defendant comprised such boxes as were tendered for freight by plaintiff, at other rates of freight, which last mentioned rates of freight were offered to be paid by the plaintiff.

4th. Because his Honor, the Judge, erred in charging the Jury, that if the defendant was in the habit of charging certain persons one cent per sample for the freight of cotton samples, that the plaintiff was bound to tender one cent per sample, before the defendant could be held liable for not receiving and carrying said boxes, although said boxes were comprised amongst articles printed and published by defendants among their rates of freight, to be by them transported and carried at other rates of freight, which last mentioned rates of freight were tendered by plaintiff, and no knowledge brought home to plaintiff, of other than the printed rates of freight.

5th. Because his honor, the Judge, erred in charging the Jury that the defendant was not liable for the refusal to carry the boxes in the plaintiff's declaration mentioned, although the master of the said Alabama had agreed to carry said boxes at the rates of freight proposed and offered by plaintiff, and had received the boxes on board said steamer.

6th. Because his Honor, the Judge, erred in charging the

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Jury that the master of said steamer Alabama, in said declaration mentioned, had no power to make any contract for the transportation and freight of the boxes in said declaration mentioned, if there was an agent in the City of Savannah whose duty and business it was to contract for freight for said steamer.

7th. Because his Honor, the Judge, erred in charging the Jury, that whilst the rule of the law was, that the master of the vessel was the proper person to make contracts for freight, yet if they found that in this case that power had been denied him, the plaintiff was not entitled to recover, although no notice of the denial of said power to the master was brought home to the plaintiff.

8th. Because his Honor, the Judge, erred in refusing to charge the Jury, when requested by plaintiff's Counsel, that notice of any variation of the general rule, that the master was entitled to make contracts for freight, must be brought home to the plaintiff, before his rights could be affected by such variation.

And it was then agreed between Counsel, that the said motion for new trial should be argued in vacation; and in pursuance of said agreement, the said argument was had, and his Honor, on the day of January, in the year 1855, overruled the motion for a new trial, and filed the following decision:

C. A. L. Lamar	}	Motion for new trial.
vs.		
New York and Savannah Steam Navigation Company.		

This action was brought to recover damages, because the defendants, being common carriers, refused to carry two certain boxes, although the plaintiff tendered the freight of twelve and a half cents per foot, that being the printed rate of freight for the transportation of boxes. The defendant refused, because the boxes contained cotton samples, the freight on cotton samples being one cent per sample.

The freight list does not mention cotton samples. The pro-

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hability is, that at the time the list was printed, the custom of sending out cotton samples had not begun. Indeed, the testimony discloses the fact that the sending of cotton samples was a new business. "The rates were not demanded by the Cherokee and Tennessee, but were demanded by the new boats Alabama and Florida." Every merchant who testified on this subject, says he was in the habit of paying one cent per sample. This rate of freight seems to have been uniform, from the time that freight was first demanded for cotton samples, to the time that these boxes containing samples were offered for shipment.

I charged the Jury that if they found the fact that the freight for cotton samples was one cent per sample, that the plaintiff could not get rid of this freight by putting his samples in a box. I don't know that the reason for charging this freight can affect the question, but if it does it is against the plaintiff, because the advantage to the merchant is the same whether the samples are sent loose or in a box. That advantage I understand to be this: it enables merchants to ship in sailing vessels for a less freight than by steamer, and yet he secures the benefit of the steamer's speed, as he can sell his cotton by sample before it arrives. The price charged by the steamer for this advantage is one cent per sample—can it be that a merchant may avail himself of the steamer's speed to sell his cotton and avoid paying for the advantage, by simply putting his samples in a box? The fact that cotton samples are not mentioned in the printed list does not vary the question, if the fact be established that one cent per sample is the freight uniformly charged and paid for samples. For example, the freight on a tea-chest is fifty cents.

"Does any one suppose that a merchant may avoid the payment of this freight by putting the chest in a box? Certainly not. Now why? Not because tea-chests are mentioned in the freight list, but because this is the usual freight for tea-chests. The principle depends upon the fact—not upon the manner in which the fact is proven. The usual freight may be proven by the freight list—but if the particular article is not upon the freight list, the usual freight may be proven by witnesses. I

repeat, the application of the principle depends upon the *fact* and not upon the *manner* in which the fact may be proven. Let it be assumed that the usual freight on cotton samples was one-cent per sample, (and this fact was left to the Jury,) then I say now, as I said to the Jury on the trial, that the plaintiff cannot avoid this freight by putting the samples in a box. One more illustration and I am done with this point. The freight on dead bodies I believe is ten dollars. Dead bodies are not mentioned in the freight list. Is this company bound to carry dead bodies, and the freight by the size of the coffin or box in which the body may be enclosed? So much as to the first proposition of Counsel, that the defendant was bound as a common carrier, to carry these samples for freight according to their printed rate for boxes.

The second proposition of Counsel is, that the defendant was bound by the contract of the Captain.

Two questions arise upon this proposition—one of fact: did the Captain contract? The other of Law: if the Captain did contract, was the defendant bound by his contract?

First. Did the Captain contract? The only evidence upon this subject is, that the Captain came down while the plaintiff and witness were talking with the agent of the company for shipping goods, Mr. Daily, and who had refused to receive the boxes, on the ground that they contained cotton samples, and said to plaintiff, "I have arranged the matter with the agents; we will take the goods on your terms". Is this proof of a contract by the Captain? I think not. To my mind it only proves that the Captain informed the plaintiff that the agent had agreed to receive his boxes. If the agents did so agree, the Captain could have proven the fact, but no such proof was offered. If the Captain did not contract, there is an end of the matter.

I however charged the Jury, that if they found, under the testimony, that the defendant had an agent present whose duty it was to make contracts for freight, that the defendant would not be bound by a contract made by the Captain. Mr. Arnold proves distinctly, "that Padelford, Fay & Co. are the agents of

the defendant in Savannah; that the Captain is not authorized to receive freight, but that the agents make *all contracts for freight*". The fact is not stated in the brief of the testimony, but it was mutually admitted by Counsel in the argument of this motion, that Mr. Arnold proved that Mr. Padelford and Mr. Fay were part owners. These gentlemen, then, according to the testimony for themselves, and as agents for the other owners, made all contracts for freight. I admit that "when a vessel is intended to be employed as a general ship, and the owners do not interfere with the receipt of the cargo, they are bound by the contracts of the master, notwithstanding the ship may be at their place of residence". But here the proof is, that the owners did interfere, Padelford and Fay being part owners, and Padelford, Fay & Co. being agents for the other owners in regard to this very matter of making contracts for freight.

But it is argued that "constant usage shows that the master has a general authority, and if a more limited authority is given, the party not informed of it is not affected by such limitation". Granted—but is the party in this case not informed of it? If the Captain has made this contract, (which I deny,) by what authority did he make it? By his general authority as master? Not at all. On the contrary, he says that he had *arranged it with the agents*. Is not this notice to the plaintiff, that he claimed no authority in the premises as master? If the agents gave him *special authority* to make the contract in this case, that fact ought to have been proven. Nor is this the only evidence of notice to the plaintiff. The evening previous Mr. Arnold informed the plaintiff that he could not send the boxes unless they were paid for as samples. We find Mr. Lamar, the next day, offering to Mr. Arnold to pay the usual rates of merchandise per foot. Does not this show knowledge in Mr. Lamar that Mr. Arnold had control of this matter?

This question of notice, it seems to me, is not a very important one, under the facts of this case, inasmuch as the boxes were not actually carried. If they had been carried, under a contract with the Captain, the company would have been bound,

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unless they could bring home notice to the plaintiff that the Captain had no authority to make the contract. But if the Captain makes a contract which he is not authorized to make, and the owners repudiate the contract *before it is executed*, and refuse to carry it into effect, they only do what they have the right to do. In such a case, (and that is the present case,) the plaintiff, to recover damages, must prove that the Captain acted within the scope of his authority. The defendant need not prove knowledge in the plaintiff that the Captain had no authority.

The right to reject a contract made for you without authority, depends not upon the *knowledge* of the party with whom the contract is made, but upon the *fact* that the agent had no authority. Whether, therefore, the Captain made this contract by virtue of his general authority as master, or by virtue of a special authority given in this particular case matters not, as the contract was repudiated before execution. The liability of the company must depend upon their right to *repudiate*: their right to repudiate must depend upon the authority of the master to contract, and the burthm of proof, in my judgment, is upon the plaintiff to prove this authority. He has not done so; on the contrary, the general authority of the master has been negatived by the testimony, and there is not a particle of proof to show a special authority.

The motion for new trial is refused.

W. B. FLEMING, Judge E. D. Ga.

And the Counsel for plaintiff tenders his bill of exceptions to said decision and says:

1st. That his Honor erred in refusing to grant a new trial, on the grounds set forth in the motion of the plaintiff.

2d. That his Honor erred in over-ruling the third, fourth, fifth, sixth, seventh and eighth grounds of the motion for a new trial, tendered by the Counsel for plaintiff.

LLOYD & OWENS, for plaintiff in error.

LAW & BARTOW, for defendants.

Lumpkin vs. The N. Y. & Sav. Steamship Nav. Co.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The argument of this case has taken a pretty wide range—though not more so than did the testimony and the decision of the Court, at the trial below. We shall confine our judgment to the case made by the pleadings. For the sake of accuracy, I herewith insert the declaration and answer filed in this case:

“The petition of Charles A. L. Lamar sheweth, that the New York and Savannah Steam Navigation Company have endangered your petitioner in this, to wit: For that whereas the said New York and Savannah Steam Navigation Company, a corporation under the laws of the State of Georgia; before and at the time of the committing of the grievances as hereinafter next mentioned, was the owner and proprietor of a certain steamship called the *Alabama*, to wit: a steamship plying between the port of Savannah, in the State of Georgia, and the port of New York, in the State of New York, for the carriage and conveyance of passengers, and also of freight for a reasonable hire and reward, between said ports, and being so, the owner of said steamship had advertised for freight for the same for a voyage from the said port of Savannah to the port of New York, for certain specified rates by said defendant, agreed upon and published, and was then and there a common carrier, and subject to all the duties and liabilities by the law imposed upon it, as such common carrier as aforesaid.

And whereas, also, while the said New York and Savannah Steam Navigation Company was such owner and proprietor, and such common carrier, and had so advertised for freight with certain rates by it put forth and published, to wit: on the twenty-eighth day of February, in the year of our Lord one thousand eight hundred and fifty-two, to wit, in the county aforesaid. Your petitioner being desirous of sending certain, to wit, two boxes from the port of Savannah to the port of New York, caused to be placed on board the said steamship *Alabama*, two boxes about eight feet long and two feet wide,

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marked Robert Collins, New York, and then and there requested the said New York and Savannah Steam Navigation Company to transport the said boxes to the said port of New York, your petitioner then and there tendering to the said New York and Savannah Steam Navigation Company the freight of said boxes, either by measure of weight, as set forth in their published rates of freight. Yet the said New York and Savannah Steam Navigation Company, not regarding its duty in that behalf, but contriving to defraud and injure your Petitioner, did not and would not convey and carry said boxes to the said port of New York, but removed the said boxes from the said vessel, and utterly refused to transport and carry the same, by means of which refusal of the said New York and Savannah Steam Navigation Company, and of its breach of duty as such common carrier as aforesaid, your petitioner was put to divers expenses in wharfage and drayage and in the employment of divers persons to remove said boxes and re-ship the same, and was also greatly delayed and injured in his business, for that he was unable to sell divers cottons at large prices and advances, from said refusal of the said defendant to convey the boxes aforesaid, containing the samples thereof.

And your petitioner in fact saith that the refusal of the said New York and Savannah Steam Navigation Company, and their breach of duty as such common carrier as aforesaid, hath endamaged your petitioner in the manner aforesaid, one thousand dollars, and thereupon he brings suit. Wherefore, your petitioner prays process may issue requiring the said New York and Savannah Steam Navigation Company to appear and answer in the premises.

LLOYD & OWENS,

Attorneys for Petitioner.

"THE NEW YORK AND SAVANNAH
STEAM NAVIGATION COMPANY

Chatham Superior Court.

CHARLES A. L. LAMAR.

And the said defendant, The New York and Savannah Steam Navigation Company, by its Attorneys, Law & Bartow, comes and defends the wrong and injury, when, &c. and says

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that the said defendant, the New York and Savannah Steam Navigation Company, is not guilty of the said supposed grievances above laid to its charge, or any or either of them, or any part thereof, in manner and form, as the said plaintiff hath above thereof complained against it. And of this the said defendant puts itself upon the country, &c.

And for further plea in this behalf, by leave of the Court, have first had and obtained, the said defendant says that the said plaintiff ought not further to have and maintain his said action thereof against this defendant, because the said defendant says, that if there was any such refusal by this defendant to transport the said boxes of the said plaintiff, as in the said plaintiff's declaration is alleged, the same was occasioned by the said plaintiff's refusal, on his part, to pay and allow to this defendant the usual and customary charge and compensation on freights for the transportation of samples of cottons, which composed the contents of said boxes, and this defendant is ready to verify. Wherefore, the said defendant prays judgment if the said plaintiff ought further to have or maintain his said action thereof against this defendant.

LAW & BARTOW,
Defendant's Attorneys.

Thus it will be perceived, that Mr. Lamar, the plaintiff, claimed to recover damages of the defendants as common carriers, for not transporting two boxes in the steamship Alabama, from the port of Savannah to the port of New York, notwithstanding a reasonable hire or reward was tendered for said service, according to specified rates agreed upon and published by the defendants. The defendants pleaded the general issue, and insisted that if there was any such refusal, on their part, as that complained of, it was because the plaintiff failed or refused to pay the customary compensation for the transportation of his goods.

The issue, therefore, made by the pleadings is, did the plaintiff offer to pay the usual rates for the service which he required? That question, we think, was properly submitted by

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his Honor, Judge FLEMING, to the Jury; and the verdict having been found for the company, it should not be disturbed. Moreover, we think the plaintiff acted under a misapprehension, as to the duties and liabilities of the company, connected with this transaction.

It seems, from the proof, that sometime since, hand-bills were published and circulated, purporting to contain the established rates of freight between New York and Savannah, by the steamships Florida and Alabama. Toward the close of this list is this item: "Measurement-articles, not enumerated above, such as boxes, &c. per foot, 12 $\frac{1}{2}$." Under this item, Mr. Lamar insisted on shipping two boxes, which were closed up and which contained 2200 cotton samples, as ordinary merchandise, at twelve and a half cents per foot, and no more. The rates demanded for cotton samples, by the boat, were one cent per sample. The merchants who were sworn on the trial, testified that they were in the habit of paying one cent per sample. Mr. Rhind, the witness for the plaintiff, admits that he had heard of this, and believed it to have been the rates charged, before these boxes were offered. This was a new business which had sprung up recently; and these rates were established in order that those who shipped cotton by the steamers, should have an advantage over those who shipped by the sailing vessels. Nothing was charged for the samples when the bales were shipped by the steamer. But to counteract the preference given to the steamers, it had become a habit to send samples, by the steamer, of cotton on board the sailing vessels, which could be sold by the samples, to be delivered on its arrival, and thus compete with that on board the steamers.

Was it right that the plaintiff should derive this benefit from the transaction, and not make adequate compensation? With this adventitious value attached to these cotton samples, should they not have been taxed higher than ordinary merchandise? Were the owners of these steamships to be compelled, as common carriers, to commit pecuniary suicide? to become the authors of their own undoing? The injury resulting to the company, as well as the benefit accruing to the shippers of cotton,

justified this extra charge. Even the printed rates provided that if extra valuable packages were shipped, the value must be declared and paid for accordingly; otherwise, the ship would not be held responsible. And it is too limited a view of the subject to hold that this extra value was restricted to the intrinsic value of the article merely.

From the fact that shipments of specie were required, in all cases, to be made known at the office of the agent, before going on board, it is contended that other articles, not enumerated, came under the head of ordinary merchandize. The presiding Judge put this point, we think, strongly in his charge to the Jury. "The fact," said he, "that cotton samples are not mentioned in the printed list, does not vary the question, if the fact be established that one per cent. per sample is the freight uniformly charged and paid for samples. For example, the freight on a tea-chest is fifty cents. Does any one suppose that a merchant may avoid the payment of this freight, by putting the chest in a box? Certainly not. Why? Not because tea-chests are mentioned in the freight list, but because this is the *usual freight* for tea-chests. The principle depends upon the *fact*, not upon the manner in which the fact is proven. The usual freight may be proven by the freight list, but if the particular article is not upon the freight list, the usual freight may be proven by witnesses. Let it be assumed that the usual freight on cotton samples is one cent per sample (and this fact was left to the Jury) I say now, as I said to the Jury on the trial, that the plaintiff cannot avoid this freight, by putting the samples in a box. One more illustration, and I am done with this point. The freight on dead bodies is, I believe, ten dollars. Dead bodies are not mentioned in the freight list (neither are cotton samples). Is this company bound to carry dead bodies at the freight by the size of the coffin or the box in which the body may be enclosed?"

I will only add, that the law which *forces* common carriers to transport freight at the usual rates, is, itself, an exception to the voluntary principle upon which other contracts are

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founded; and of doubtful expediency. We are unwilling to extend the doctrine any further than it has gone.

Whether Captain Ludlow, the master of the vessel, was authorized to make a special agreement with Mr. Linnar, relative to this freight, at the place of the residence of the part owners and agents of the ship, who were personally present, interfering in the matter and virtually repudiating the contract; if, indeed, any such were made, we have deemed it unnecessary to decide. Suffice it to say, that this action is not brought to recover damages for the breach of any such supposed agreement. The doctrine upon this point will be found to be very clearly stated by Mr. Flanders, in his *Treatise on Shipping*. (§141, 147 and 477, and the notes thereto appended. *Abbott on Shipping*, 161, note 3; *Story on Agency*, §116. 6 *Cowen's Rep.* 178. 11 *Mass. B.* 90. 3 *Pick. Rep.* 405 and 3 *Sumner C. C. Rep.* 228.) In this last case, Judge Story, deputed as he was to this branch of the science—Maritime Law—has exhausted all the learning of the books upon this subject. Judgment affirmed.

No. 62.—JAMES S. BRADWELL, Ordinary of the County of Liberty, plaintiff in error, vs. MARY SPENCER, administratrix of William Spencer, deceased, defendant.

[1.] A judgment which is rendered by a Court having jurisdiction of the cause and the parties, binds the parties until set aside, notwithstanding the existence of irregularities in the proceedings previous to the judgment, provided those irregularities are such as may be waived by parties.

[2.] A judgment against the principal is *prima facie*, but not conclusive evidence against the surety.

Debt, in Liberty Superior Court. Tried before Judge FLEMING, April Term, 1854.

This was an action on a guardian's bond, brought against the administratrix of William Spencer, the security on the bond, for a *devastavit* of Samuel Spencer, the guardian.

On the trial the plaintiff offered in evidence a decree of the Superior Court of Liberty county, rendered on the 5th day of December, 1848, upon a bill filed by Monroe McIver, by his guardian, Henry M. Stevens, complainant, against Samuel Spencer, defendant, who was the guardian of said Monroe McIver, charging the said Samuel Spencer with waste and *devastavit* of the estate and effects of the said Monroe McIver, his said ward. Upon which bill a rule of Court was taken, referring the said case to arbitration, and directing that the said award of the said arbitration should be entered up as the judgment and decree of the Court; which evidence was offered to prove the *devastavit* and indebtedness of the said Samuel Spencer, guardian to his said ward, Monroe McIver; to the admission of which testimony the defendant objected and insisted that the same ought not to be admitted. A certified copy of the bond of said Samuel Spencer, as guardian, and of the said decree, the original bill, rule of reference to arbitration and award rendered, are herewith annexed. The plaintiff insisted that said evidence ought to be admitted on the trial of said issue, on the following grounds:

1st. Because a judgment or decree rendered against a guardian, establishing a *devastavit* or amount of indebtedness against the guardian, in favor of the ward, is admissible *prima facie* evidence in an action on the guardian's bond, against his security on the bond.

2d. Because the defendant could not go behind the decree for the purpose of inquiring into the regularity of the decree, or the award on which said decree was founded and rendered. And the Court did over-rule said motion and excluded the testimony, on the ground that the rule of Court referring the said case in Equity to arbitration, required the award to be taken and returned into Court at least thirty days before the next term of Court; and it appearing from the date of the award that it had not been returned into Court thirty days

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before the then next term, the decree was irregularly taken and entered up, and could not be admitted in evidence.

The plaintiff then offered to prove by parol that the said decree was rendered with the knowledge and assent of the said Samuel Spencer, which motion the said Court over-ruled, and refused the said testimony, and did exclude the same. Wherefore, the said plaintiff closed his case and the said defendant moved for a non-suit, which the said Court accordingly ordered.

On which decisions error is assigned.

LAW & BARTOW, for plaintiff in error.

WARD & OWENS for defendant.

By the Court.—BENNING, J. delivering the opinion.

[L.] Any judgment which is rendered by a Court that has jurisdiction of the cause and the parties, binds the parties until set aside, notwithstanding the existence of irregularities in the proceedings; previous to the judgment, if those irregularities are such as may be waived by parties. (*Rogers vs. Evans*, 8 Ga. R. 145. *Tucker vs. Harris*, 18 do. 19.)

The decree in question in this case, was rendered by a Court which had jurisdiction of the cause and the parties.

The rule of Court, referring the cause to arbitration, did not deprive the Court of jurisdiction of the cause—did not put the cause out of Court. On the contrary, the rule in terms retained the cause in Court, for it provided that something was to be done in the cause in the Court after the time of the reference, namely: that the award was to be returned to the Court, and by the Court be made the judgment of the Court.

Nothing of this sort could be done in a cause not in Court—in a cause over which the Court had no jurisdiction.

Indeed, the cause would not have been put out of Court by the reference, even if in the order of reference itself, there had not been this express retention of the cause. A general reference under an order of Court, does not have the effect to put the referred case out of Court. That effect is pretended,

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both by the Statute of 1799 and by the old law—the law which we adopted by the Act of 1784. The 30th section of the Act of 1799, is in these words, in part: “In all matters submitted to reference by parties in a suit under a rule of Court, or other agreement signed by the parties, judgment shall be entered up by the party in whose favor the award is given, and execution shall issue for the sums awarded to be paid, as they respectively become due, and to be levied on the property of the party against whom the judgment shall have been entered up; and such other proceedings shall be had thereon by the Court, as in cases of judgments entered up on verdicts of Juries”. According to these words, a Court no more loses jurisdiction of a cause by committing it to arbitrators, than it does by committing it to a Jury.

This Statute applies to Courts of *Law*; still, it governs Courts of *Equity*, for it is the business of *Equity* to follow the *Law*.

And the law of our adoption is not different, in this respect, from the Statute. By that law, the jurisdiction of causes, whether they be pending in Courts of *Law* or Courts of *Equity*, is not lost by a reference of the causes to arbitration. (*Russell on Arbitrators*, 682, 4, 5, 6.)

The Court, then, rendering this decree, had *jurisdiction* of the cause and of the parties.

The decree, however, was preceded by an irregularity.

The award on which it was founded had been ordered to be returned to Court thirty days before a particular term; whereas, in fact, it had not been returned thirty days before that term. Was the decree good until set aside, notwithstanding this irregularity? It was. The time for making an award may be enlarged by consent of parties—by consent, either express or implied. (*Russell on Arb.* 141.)

This irregularity, therefore, was one which the parties might waive.

It follows, from the general principle first laid down, that the decree was good until set aside.

[2.] But a decree or judgment which binds the principal, is

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prima facie evidence against the surety. (*Bryant, guardian, &c. and others vs. Pye, L. Kelly, 355.*)

This decree bound Samuel Spencer, who was a party to it, and he was the guardian and the principal in the guardian's bond; and William Spencer, the intestate of Mary Spencer, the administratrix, was the surety of Samuel on that bond.

The decree, therefore, was *prima facie* evidence against her. And so it seems that the Court below was wrong in not admitting the decree in evidence.

There ought, therefore, to be a new trial—and as on that the decree will be admitted as evidence, it becomes unnecessary to decide the question whether the parol evidence offered to render the decree admissible, was itself admissible.

No. 63.—THOMAS G. PRIGLEAU, plaintiff in error, vs. THE SOUTH WESTERN RAIL-ROAD BANK, defendant.

- [1.] A bond under seal is, by the laws of South Carolina, assignable by indorsement, in blank, thereon.
- [2.] It is well settled in South Carolina, that a bond may be transferred by assignment not under seal.
- [3.] A power of Attorney to transfer a bond under seal, need not, itself, be under seal.
- [4.] Where H A M, the original payee of a bond, had transferred the same to F K H; and afterwards, and when said bond (being a negotiable instrument) had been, by the assignee, negotiated and assigned to a third party, the said H A M made an entry of satisfaction as to said bond, in the Secretary of State's office, in Charleston, S. Carolina: Held, that said entry could not operate to defeat the rights of third persons, derived under said assignment.

Motion to distribute money, in Chatham Superior Court.
Decided by Judge FLEMING.

A sum of money was in the registry of the Superior Court, of the County of Chatham, to be distributed under the order of the Court. This sum of money was the proceeds of the sale of certain slaves, sold under foreclosure of mortgages, one in favor of the South Western Railroad Bank, against Samuel Prielean, and one against General James Hamilton, in favor of Dr. Thomas G. Prielean; and was brought into Court to be distributed under agreement.

The plaintiff in error presented to the Court the following claim to the fund:

On the first day of January, eighteen hundred and thirty-seven, in the State of South Carolina, the slaves were sold by Henry A. Middleton, to Samuel Prielean.

In eighteen hundred and thirty-eight, Samuel Prielean, in consideration of James Hamilton's having assumed the payment of a bond, dated the first day of January, eighteen hundred and thirty-seven, for twelve thousand dollars, (being a part of the purchase money of the negroes) of which he was the security, transferred the said slaves to the said James Hamilton.

James Hamilton mortgaged the said slaves to Dr. Thomas G. Prielean, to secure him from loss as endorser of a note for ten thousand dollars, (a part of the purchase money,) which was distributed by the Bank of the State of South Carolina, said which was given for the purchase of the negroes originally to Henry A. Middleton, and on which Samuel Prielean was indorser, in his life-time.

On the twenty-eighth day of March, eighteen hundred and fifty-three, Thomas G. Prielean, under the Statutes of the State of Georgia—the negroes being then in Georgia—foreclosed the said mortgage.

The following is the claim presented by the defendant in error:

On the first day January, eighteen hundred and thirty-seven, Samuel Prielean and James Hamilton executed their bond to to Henry A. Middleton, for the sum of twelve thousand dollars, to be paid in three equal annual instalments, and on the

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same day, to secure the payment of the said bond, Samuel Prielean mortgaged these slaves to Henry A. Middleton.

On the twenty-eighth day of November, eighteen hundred and thirty-seven, Henry A. Middleton, under an order and decree of the Court of Chancery of Charleston, assigned and transferred the said bond to Francis Kinloch Huger and Francis Kinloch, as trustees under the said decree.

On the twenty-fifth day of January, eighteen hundred and forty-three, an indorsement is made upon the said bond, that it is held as collateral security for a note of Henry D. Grager, dated the second of January, eighteen hundred and forty-three.

There is a blank indorsement without date upon the said bond, as follows: 'Francis K. Huger, by Attorney Henry A. Middleton.

Various payments are indorsed upon the said bond, as follows:

On the twelfth of January, eighteen hundred and thirty-eight, an indorsement of eight hundred and forty dollars, by

C. M. FURMAN, Cashier.

On the thirty-first of January, four thousand dollars for the first instalment of the bond, and interest on the same, twenty-three dollars and seventy-eight cents:

C. M. FURMAN, Cashier.

On the first of January, eighteen hundred and thirty-nine, five hundred and sixty dollars, for one year's interest.

C. M. FURMAN, Cashier.

On the first of February, eighteen hundred and thirty-nine, four thousand and twenty-three dollars and thirty-three cents, for second instalment and interest from the first of January to date.

HENRY A. MIDDLETON.

On the fifth of February, eighteen hundred and forty-two, two hundred and eighty dollars in full of the interest:

N. M. MIDDLETON, Agent for

HENRY A. MIDDLETON;

and FRANCIS K. HUGER:

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On the ninth of March, eighteen hundred and forty-two, five hundred and sixty dollars, for interest to first of February last.

HENRY A. MIDDLETON.

On the thirtieth day of March, eighteen hundred and forty-two, Henry A. Middleton, under a decree of the Court of Chancery, assigned the mortgage to Francis Kinloch and Francis Kinloch Huger.

On the second day of February, eighteen hundred and fifty-three, the South Western Rail-road Bank, by affidavit under the Statutes of Georgia, foreclosed the said mortgage before Montgomery Cumming, one of the Justices of the Inferior Court of Chatham County.

It appeared in evidence, that, on the twelfth of February, eighteen hundred and forty-four, Henry A. Middleton had indorsed upon the records, in the Secretary of State's Office, in Charleston, "satisfied in full, and discharged, together with the bond secured thereby."

This bond had been transferred to the South Western Rail-road Bank, as collateral security for debt due by Lynch Hamilton, dated the first day of March, eighteen hundred and forty-six.

All of these transactions, save the foreclosures, occurred in the State of South Carolina.

Under the above statement of facts, his Honor, Judge FLEMING, pronounced the following decision:

On the first day of January, eighteen hundred and thirty-seven, Samuel Prioleau purchased certain negroes from Henry A. Middleton, and gave his bond for the purchase-money, which bond was secured by a mortgage of the negroes purchased. This mortgage having been foreclosed by the South Western Rail-road Bank, the proceeds of the sale are claimed by Thomas G. Prioleau, under mortgage *fi. fa.* against James Hamilton.

I will state briefly how each party claims this money. The South Western Rail-road Bank claims that Henry A. Middle-

tion, the payee of this bond, under the Decree of the Court of Chancery of Charleston, assigned this bond and the mortgage securing it, to Francis K. Huger and Francis Kinloch as trustees under said decree. That Francis K. Huger, as surviving trustee, endorsed said bond, in blank, and delivered the same to the Bank of Charleston as collateral security. That the Bank of Charleston delivered said bond and mortgage, so indorsed in blank, to them the said South Western Rail-road Bank, by which they became the owners and proprietors of said bond and mortgage—that as such owners and proprietors, they have foreclosed the mortgage, and are entitled to the proceeds of the sale under their mortgage *fi. fa.*

Thomas G. Prioleau claims: That James Hamilton purchased the said negroes from Samuel Prioleau; and mortgaged them to him (Thomas G.) and that he is entitled to the proceeds of the sale, first, because the South Western Rail-road Bank had no legal title to the bond and mortgage, and therefore could not foreclose it; second, that said bond and mortgage had been fully paid off and discharged. On these grounds Thomas G. Prioleau claims that this money should be paid over to his mortgage *fi. fa. vs. James Hamilton.*

Two questions are thus presented for my decision: first, had the South Western Rail-road Bank a legal title to this bond and mortgage at the time of foreclosure? Second, has the said bond and mortgage been paid off and discharged?

First, as to the title of the South Western Rail-road Bank. The papers before me show, that Henry A. Middleton, under the order and decree of the Court of Chancery of Charleston, assigned this bond and mortgage to Francis K. Huger and Francis Kinloch, as trustees under said decree. I do not understand that the validity of this assignment is called in question. Even admitting that bonds are not negotiable, and that therefore, Henry A. Middleton could not, of himself, convey the legal title in this bond; yet I apprehend that a Court of Chancery, in a case where justice and equity required it, may, by its decree, vest the legal title to a bond in trustees, and that the said trustees could, in their own names, collect said bond,

for the benefit of the trust estate. Counsel, however, if I understand him, does not make the question upon this assignment, but upon the blank indorsement of Francis K. Huger, surviving trustee, by Attorney, Henry A. Middleton. Does this indorsement convey the legal title? Counsel contends that it does not, for two reasons: first, because bonds are not negotiable; second, because if negotiable, it being a sealed instrument, the indorsement should be under seal; or if the indorsement need not be under seal, yet that being indorsed by Attorney, the power of the Attorney to indorse should be under seal.

At Common Law, bonds are not negotiable, but our Statute has made them negotiable in a particular way, viz: by indorsement. (*Cobb's Dig.* 519.) True, the Statute makes them negotiable in such manner and under such restrictions as are prescribed in the case of promissory notes; and promissory notes, to be negotiable, must contain *negotiable words*, as required by the Statute of Anne. (1 *Kelly*, 286.) The only negotiable words mentioned in the Statute of Anne are "order" and "bearer"; must then a bond contain the word "order" or the word "bearer", in order to be negotiable by indorsement under our Statute? I think not. Undoubtedly there must be negotiable words, but I think any word equivalent to the words used in the Statute of Anne would be sufficient. Is not assigns a negotiable word? Is it not equivalent to the word "order"? If I promise to pay A B or his assigns, do I not promise to pay any one to whom he may order it paid? I never saw a bond payable to order or bearer, and I never saw a promissory note payable to assigns, and yet the statute makes bonds negotiable by indorsement, in the same manner as promissory notes. I cannot suppose that the Legislature spoke of these instruments otherwise than as they were known usually to exist. The statute is unmeaning, unless the Legislature intended to make bonds payable to assigns, negotiable by indorsement, in the same manner as notes payable to order were negotiable by indorsement. Any other construction, it seems to me, would make the statute a nullity, for bonds are never made payable to order or bearer—at least I have never seen

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such a bond. This view, I think, is indirectly sustained by the case in *1st Kelly*, 75; for the Court there, in deciding that a bill of sale is not negotiable under our Statute, puts the decision not upon the ground that a bill of sale does not contain the word order or bearer, but upon the ground that the Statute includes only *liquidated demands for the payment of money or some article of property*. From this, I infer that but for this fact, bills of sale would have been negotiable, that is, negotiable although they do not contain the words order or bearer. My decision then is, that a bond payable to A B or his assigns, may be negotiated by indorsement, in the same manner as a note payable to order may be negotiable by indorsement.

The next question is, has this bond been indorsed? The indorsement is in these words: "Francis K. Huger, per Attorney, Henry A. Middleton". The proposition of Counsel here is, if I remember it, that the bond being under seal, the indorsement must be under seal. To this I reply, that the Statute does not say so. The negotiability of bonds is entirely the creature of Statute. If the Statute makes bonds negotiable by indorsement, I may not add to the Statute the words, "under seal". This, it seems to me, would be an act of judicial legislation. Promissory notes are negotiable by indorsement *not under seal*; the Statute makes bonds negotiable in the same manner as promissory notes; that is to say, negotiable by indorsement *not under seal*. The second proposition of Counsel is, that if the indorsement need not be under seal, yet that being indorsed by Attorney, the *power of the Attorney* should be under seal. I grant that an Attorney, to bind his principal under seal, must have a power under seal: but as the indorsement need not be under seal, neither is it necessary that the power to make it should be under seal. Besides, what right have third parties to make this question? The power of Middleton to sign Huger's name, it seems to me, can only be denied by Huger himself, or some one standing in his place.

The last question for my decision is, whether this bond has been paid off and discharged? On the twelfth day of February, eighteen hundred and forty-four, Henry A. Middleton en-

tered full satisfaction of this bond and mortgage on the records in the Secretary of State's office, Charleston, South Carolina. The South Western Rail-road Bank came to the possession of this bond and mortgage, subsequent to the entry of the satisfaction. Was the bond paid when the South Western Rail-road Bank received it? This depends upon the question, whether H. A. Middleton had the right to enter satisfaction at the time it was entered; and this right depends upon the fact whether the bond, at the time of the satisfaction, had been negotiated; and in the hands of the Bank of Charleston. The blank indorsement upon the bond has no date; but a memorandum upon the bond shows that it was held by the Bank of Charleston as collateral security for the payment of a note dated on the second of January, eighteen hundred and forty-three. Am I not authorized to infer that the bond was indorsed, and in the hands of the Bank of Charleston, at the date of the note for which it was held as collateral security? There is no evidence that the bond ever again came to the possession of Huger or Middleton, or that they ever had the right to the possession. On the contrary, it appears from the affidavit of James G. Holmes, that the Bank of Charleston, in 1846, passed the bond to the South Western Rail-road Bank, who received it as collateral security for a debt due them. The satisfaction by Middleton, then, is a perfect nullity. Apply the principles contended for by the Counsel to his own case, and he is clearly not entitled to this money. He claims under Hamilton's assignment of his bill of sale from Prieleau; but bills of sale are not negotiable. (1 Kelly, 75.) Again, he claims that Middleton's power of Attorney to indorse, should be under seal; and yet, he claims the benefit of a satisfaction entered by Middleton, without showing any authority in Middleton to enter this satisfaction, under seal or otherwise.

It is ordered that the money in dispute be paid over to the South Western Rail-road Bank or their Attorneys.

W. B. FLEMING, Judge E. D. Georgia.

Whereupon, Counsel for defendant excepted to the said decision and judgment of the Court and says:

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1st. That the Court erred in deciding that bonds were negotiable, by indorsement, in the same manner as notes payable to order were negotiable by indorsement.

2d. That the Court erred in deciding that a bond, although under seal, was negotiable and transferable by indorsement not under seal.

3d. That the Court erred in deciding that the assignment of a bond was not necessary in order to convey the legal title to the assignee, a simple blank indorsement being sufficient.

4th. That the Court erred in deciding that the power of an Attorney to transfer a bond under seal, need not itself be under seal.

5th. That the Court erred in deciding that the entry of satisfaction of the bond and mortgage was invalid; and as the facts aforesaid do not appear of record, the defendant, by his Counsel, prays that this, his bill of exceptions, may be signed and certified, as required by the Statute in such case made and provided.

WARD & OWENS, for plaintiff in error.

LAW & BARROW, for defendant.

By the Court.—STARNES, J. delivering the opinion.

Something was said in the argument, to the effect that the Court below had decided a question of fact which should have been submitted to the Jury. But this was not insisted on as error in that Court, and we must confine ourselves to the record.

[1.] The first ground of error brought to our attention by that record is, the decision of the Court that a bond under seal is assignable by indorsement in blank.

The bond before us was executed, indorsed and negotiated in the State of South Carolina; and the law of that State, the *lex loci contractus*, must control the question.

1. Let us, then, ascertain whether or not this bond by the law of the contract, was negotiable?

It is made payable to the payee and his assigns, and such a bond is negotiable in South Carolina. Indeed, it seems that an Act was passed by the Legislature of that State, in the year 1808, for the purpose of making all bonds negotiable, however made payable, and authorizing the assignee to sue upon them. (2 *Faust*, 215. 1 *Brev. Dig.* 96. *Farmer vs. Baker & Leach*, 3 *Brev. R.* 548.)

We know, that in Georgia such an instrument would be negotiable by the terms of the Act of 1799. 2. We must next inquire whether or not this bond was negotiable by blank indorsement. It would seem that upon elementary principles, as was held by Judge ELEMINE, the effects of an indorsement, in blank, upon any negotiable paper, upon an instrument payable to A B and his assigns, for example, is equivalent to a transfer or assignment of the same. The effect of it, is, in short, but a permission to the assignee to write over the indorsement whatever is necessary to give him right and title. Such is certainly the signification of an indorsement upon a promissory note, according to the Law Merchant.

At all events, such is the law of South Carolina, and it governs this question. *Stoney vs. McNeil*, (*Harp. R.* 156.)

It is made the law of our State, too, if it were not so upon general principles, by the 25th section of the Judiciary Act of 1799, which declares that "all bonds and other specialties and promissory notes, and other liquidated demands, bearing date since the 9th day of July, 1791, whether for money or other thing, shall be of equal dignity, and be negotiable by indorsement, in such manner and under such restrictions as are prescribed in the case of promissory notes."

[2.] We are next asked to decide, whether or not a bond under seal can be assigned or transferred only by an indorsement or assignment under seal.

The rule that a sealed instrument can be transferred only by an instrument under seal, seems not to have been well settled or universal at Common Law. (*Orak. Elys.* 486. 3 *Rep.* 62.)

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The same appears to have been rigidly enforced only where the transfer was of the fee to real estate. (*Runyan vs. Mersereau*, 11 John. 584. *Dawson vs. Coles*, 16 John. 51.)

However this may be, the law is well settled in South Carolina, that a bond may be transferred by assignment not under seal. *Howell vs. Bulkley*, (1 N. & McC. 250.)

[8.] It was also insisted that error was committed by the Court below, that the power of Attorney to transfer a bond under seal need not, itself, be under seal.

This point is influenced by that last considered. If the payee or assignee may assign without a seal, there seems to be no good reason why a seal is necessary to the appointment of an agent or Attorney to do so for him—no reason why greater solemnity should be required in the qualification of the agent, than in the execution of the act which the agent is to perform.

[4.] And, finally, it is complained that the Court erred in holding that the entry of satisfaction on the bond and mortgage was invalid.

The entry of satisfaction which is relied upon by the plaintiffs in error, was made by Henry A. Middleton, on the 12th day of February, 1844, in the Secretary of State's office in Charleston, So. Carolina. It appears, however, from the record before us, that on the 28th day of November, 1837, under an order and decree of the Court of Chancery, Middleton assigned and transferred this bond to Francis Kinloch Huger and Francis Kinloch, as trustees; and this decree and assignment appear, here, unimpeached and of full force and effect. Subsequently, Francis Kinloch Huger, by Attorney, as surviving trustee, indorsed and transferred the bond to the Bank of Charleston; from whom it passed to the defendant in error. This assignment to the Bank of Charleston, as appears by a memorandum on the bond, was made on the 2d day of January, 1848. That it was legal, we have decided.

Under these circumstances we do not see, nor have we been told, how Henry A. Middleton could have had any right, after he had assigned the bond in obedience to the decree directing him so to do, to have made this entry of satisfaction, and so

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pecially do we not see how this could have affected the rights of the assignees who had received a negotiable security, by a prior indorsement and assignment.

Let the judgment be affirmed.

No. 64.—JOHN BURKHALTER, plaintiff in error, vs. WILLIAM H. EDWARDS, défendant.

[1.] A party cannot discredit his own witness—he may show, however, that the fact is different from what the witness has stated.

[2.] A Sheriff's deed is admissible in evidence as *color of title*, although unaccompanied by the execution under which the property was sold.

[3.] A person having the paramount title to land, who not only acquiesces in the sale of it, as the property of another, but encourages the same, is estopped from afterwards asserting his legal title against a purchaser, whether by making it satisfactorily to appear that he was ignorant that the land was included in this grant, and making compensation for the injury he has occasioned by his mistake. *Quere?*

[4.] If the real owner encourages another to grant a part of his land as vacant, and to occupy it for seven years or more, by cutting timber, trees and saw-wood, all the time claiming it as his own, it constitutes such a possession as will mature into a statutory title, as against the plaintiff himself.

[5.] Lands may be twice granted for many practical purposes.

Ejectment, in Tatnall Superior Court. Tried before Judge Holt, October Term, 1854.

The facts of this case are as follows: In 1816, a grant was issued by the State to William Wilder, for seven thousand acres of land in the County of Tatnall. In 1828, Wilder conveyed the land to Ebenezer Jenks, and in 1838, Jenks conveyed to William H. Edwards, the defendant in error. In 1848, Edwards being engaged, at the time, in litigation, con-

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earning the purchase-money of the land, instituted proceedings to have a portion of the tract run up as vacant land.

At the same time, one John H. Smith was proceeding to secure the same portion in the same manner. Smith told Edwards that he (Smith) had the oldest survey; upon which Edwards offered, if Smith would pay him the expenses incurred by him in the matter, to withdraw his application, which Smith did; and obtained a grant for the land and went into possession. In 1845, Edwards, controlling a *f. fa.* against Smith, pointed out this land as his, and caused it to be levied on and sold by the Sheriff, he present at the sale and making no objection.

Benjamin Brewton and John A. Mattox became the purchasers, and in 1847 Mattox conveyed his interest to Brewton; Edwards being a witness to the deed. In 1880, Brewton conveyed to Burkhalter, the plaintiff in error, and the land continued, from that time until now, in the possession of Burkhalter.

In 1852, Edwards brought his action of ejectment against Burkhalter for the land, founding his claim upon the original grant to Wilder, and the chain of title to himself, which was proved to cover the land.

Upon the trial, the following points arose: When the grant to Smith was offered in evidence, by defendant, being objected to, the Court refused to admit it for any other purpose but to show color of title, holding that land cannot be twice granted, and that, as a grant, it was of no force, to which defendant excepted.

The defendant offered the Sheriff's deed, without the *f. fa.* on which it was founded; and proved by the former Sheriff who had sold the land; and by the present Deputy Sheriff, that they knew nothing of the *f. fa.*; the Deputy Sheriff stating that he had but one *f. fa.* of the Central Bank against John H. Smith, and on that there was no entry whatever.

Col. W. B. Gaulden, of Counsel for defendant, was offered to prove that he had applied to the Deputy Sheriff for the *f. fa.* and was told by him that there was no such *f. fa.* in office. This evidence the Court rejected, on the ground that defendant

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should not contradict his own witness; and decided that the loss of the *fi. fa.* was not satisfactorily shown, and rejected the Sheriff's deed, and defendant excepted.

Defendant then offered the deed as color of title, under the *Document Act*, and at the same time offered to prove that Edwards was present at the sale, and made no objection to it, and no mention of his own title, and that he had pointed out the land to the Sheriff, to be levied on as Smith's property. All which was rejected by the Court, except the fact of the sale; and to this decision defendant excepts.

Defendant also excepted, because the Court refused to charge that if, at the time Edwards bought the land, it was in the possession of another under adverse claim, that the purchase was void under the Statute of *Henry VIIIth* against buying pretended titles; and also, that Court did charge that the act of cutting timber on the land did not constitute adverse possession, and that land could not be twice granted by the State.

Upon the above stated points, error is assigned.

GAULDEN, for plaintiff in error.

D'LYON & SCHLEY, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

It is not advisable, we apprehend, to enter minutely into the consideration of all the points, in detail, which are spread out upon this record. It would involve unnecessary repetition. Having expressed the opinion of the Court, upon the main questions which must control the present and future disposition to be made of this case, we shall have discharged our duty.

[1.] Was the Court right in rejecting the testimony of Wm. B. Gaulden, Esquire, the Attorney of the defendant, and who tendered himself as a witness, to prove that he applied to the Deputy Sheriff for the *fi. fa.* under which the land in dispute was sold? The evidence was repelled by the Court, on the

ground that the defendant could not contradict his own witness. . . It is not apparent, from the record, how the testimony of Col. Gaulden would gainsay ~~any~~ thing stated by the Deputy Sheriff. It is alleged in the argument, however, and acquiesced in, seemingly, by the other side, that the interrogatory had been previously propounded to the Deputy Sheriff, whether Col. Gaulden had not applied to him for this paper; and that he had answered in the negative.

Admitting this to be so, was it not competent to establish, by Counsel, that such was the fact? And would this be any disturbance of the rule which will not allow a party to discredit his own witness? Whatever diversity of opinion may have existed upon this question, we consider it as settled, both upon reason and authority, in the affirmative. A party is not to be sacrificed by his witness; and he ought not to be entrapped by the arts of a designing man, perhaps in the interest of his adversary. He ought, therefore, to be permitted to relieve himself from the effect of testimony which has taken him by surprise, not by showing that the witness, from his general character for truth, is not entitled to credit, but by showing that the fact is different. (*Wright vs. Beckett*, 1 M. & Rob. 414, 416, per Lord Denman; 1 Phil. & Am. on Ev. 904, 907; *Rice vs. New Eng. Marine Ins. Co.* 4 Pick. 439; *Rez vs. Oldroyd, Rus. & Ry.* 88, 90, per Lord Ellenborough, and *Mansfield, Q. J.*; *Brown vs. Bellows*, 4 Pick. 179; *The State vs. Norris*, 1 Hayw. 437, 438.)

[2.] Ought the Sheriff's deed to the land, unaccompanied by the execution under which the sale was effected, to have been admitted as *color of title*? We think so, most clearly. Conceding that the Sheriff sold without authority, and this is the most that can be presumed from the absence of the *fi. fa.*; and that consequently, his conveyance was void; still, if the purchaser took and held possession under the deed, it was good as *color of title*. The presiding Judge recognised this rule, in relation to the grant to Wm. H. Smith; for while he held that that grant was void, the same land having been previously granted, by the State, to Wm. Wilder; still, he allowed it to

go to the Jury *as color of title*. And this error, in rejecting the Sheriff's deed, *as color of title*, was fundamental; for without this deed and the possession under it, the defendant's statutory or possessory title was confessedly incomplete. With it, the Jury were authorized to find that the bar to the action was conclusive.

[3.] Another material exception in this case is, the repudiation, by the Court, of all the acts and declarations of Wm. H. Edwards, which the defendant proposed to set up, as amounting to an estoppel to his assertion of title to the premises in controversy, to-wit: the pointing out of the land to be levied on as the property of Smith, being actually present at the sale and interposing no claim or objection, and his subsequent attestation of a deed from Mattox to Brewton, to the same land, &c. All the proof, to this point, should have been received, for it demonstrates that Mr. Edwards not merely tacitly acquiesced in Smith's title, but encouraged others to buy under it. Mr. Justice *Lawrence*, in 6 *Den. & East*. 556, stated that Lord *Mansfield* had held; that similar circumstances amounted to a good estoppel, *at Law*. And if they would so operate in England, much more would they, in this State, where, by the Act of 1820 and other legislation, the *Law powers* of the Courts have been so much enlarged.

[4.] It is proper to notice the character and effect of the adverse possession relied on in this case, to protect the defendant against a recovery.

In 1816, a tract of land containing 7,000 acres, was granted, by the State, to William Wilder. In 1823, Wilder conveyed to Ebenezer Jenks; and in 1833, Jenks sold to Edwards, the plaintiff in ejectment. In 1838, Mr. Edwards being involved in litigation with Jenks or his real or pretended assignee, as to the payment of the purchase-money, which he had agreed to give for the land, probably considered it his interest, at that time, to make it appear that his vendor's title was defective. He took initiatory steps to run up the land in dispute as vacant, but waived his claim in favor of Wm. A. Smith—the latter refunding to him the money which he had expended in pro-

curing a warrant to issue, and causing a survey to be executed. With the knowledge of Edwards, and by his consent and approbation, Smith had the land granted to himself, and commenced, forthwith, exercising acts of ownership over it, by cutting timber, trees and ash-wood, which he continued to do from 1838, when the land was granted, to 1845, when it was pointed out by Edwards as Smith's property, and levied on and sold as such, Edwards being present. And this same kind of occupancy continued, with short interruptions, perhaps, down to 1852, when this suit was instituted.

Did these facts constitute adverse possession in Smith and those deriving title, by Sheriff's sale, through him, *as against Wm. H. Edwards*? They might not, perhaps, as to other persons; and would not, ordinarily, amount to such notorious, open and visible occupancy as would be sufficient to give notice to the true owner. And this is the meaning and object of the rule of law, as to the nature of that possession which will oust the true owner of his title. But this is a special case; for here the possession was not impliedly, but in fact, known to Edwards and with his consent, and with notice, that these acts of ownership were exercised by virtue of the independent title which Smith held to the land. We hold that it was good, under the circumstances, as to him.

And for Mr. Edwards to relieve himself, it is incumbent on him to make it satisfactorily appear that this conduct of his was not the result of prudential considerations, to avoid the payment of his debt to Jenks, much less of fraudulent motives, either as it respects Jenks or Smith; but the effect of ignorance, not of his title—that will not excuse him—but of the fact that this parcel of land was embraced in his deed from Jenks. This done, and he having relieved himself from the imputation of that gross negligence, in ascertaining the fact which, in contemplation of law, is equivalent to fraud, and having offered to make adequate redress to Smith, or those claiming under him, for the expense which they have incurred, by reason of his *laches* or misconduct, and he may, *perhaps*, be relieved from the dilemma in which he has involved himself.

[5.] Before concluding this opinion, it may be well enough to advert to that portion of the charge of the Court which declares that land cannot be twice granted by the State. If our learned brother intended to say, as we doubt not he did, that the same land could not be twice *rightfully* granted by the State; that having parted, by grant, with all of her interest in and to a certain portion of her territory, there was nothing left in her to grant a second time—no one could doubt the correctness of the abstract proposition. The declaration, however, was not correct, as applicable to the case before the Court. For, practically, it is true that the same land may be twice granted; and the second grant made available as a muniment of title for many purposes. It may be asserted with equal truthfulness, that the same land cannot be twice deeded by an individual, yet how often is this done, and the junior conveyance prevail against the elder. It is a common practice with our people who own a large body of land composed of various parcels—the title to a portion of which it may be difficult, if not impossible, to trace—to cause a survey to be made of the whole, under a Head Right or some other warrant for that purpose, and to take out a grant for the whole; seven year's possession under which, would make it available for all purposes, of either attack or defence—so in this case. The land in dispute was granted originally to Wilder—Mr. Edwards, when he becomes the purchaser, permits Mr. Smith to survey and re-grant a portion of the land, which he claims to have occupied, peaceably and continuously, for seven years under his younger grant. If the proof be so, his title is perfected. But to make the case stronger, suppose Mr. Edwards had relinquished by deed to Smith: would not this have consummated Smith's title under the second grant; and might he not, in all coming time, and for all possible purposes, have rested on this second grant as the foundation of his title?

In this and divers other views then, land may be twice granted. And it is claimed by the defendant that the acts of Mr. Edwards, done and omitted in relation to this land, are

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tantamount to a release—that they at least amount to an estoppel *in pais*.

We would add, that in the judgment of this Court, the Court below was right in maintaining that the deed from Jenks to Edwards, was not obnoxious to the Act of *Henry VIIIth* against purchasing pretended titles. It was made five years before the land was granted to Smith, or possession taken under that grant.

Finally, we affirm the ruling of our brother in rejecting the Sheriff's deed *as title*, without the production of the *fi. fa.* The officer's authority to sell must be produced or accounted for, in which event secondary evidence would be allowed.

Judgment reversed.



No. 65.—HENRY RICKS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant.

- [1.] Nothing but *written* permission from the owner, overseer or employer of a slave, or from some other person authorized to give such permission, will justify a person in buying or receiving cotton from such slave.
- [2.] A new trial will not be granted for an error which was entirely harmless; at least, it will not be in cases in which there was no motion for a new trial, in the Court below.
- [3.] An indictment which follows the words of the part of the Code on which it is founded, is good.
- [4.] The Court states correctly to the Jury, what is the whole law of the case: It then tells them, "the Court may be wrong, but you cannot be wrong in taking the law from the Court": *Held*, that this, although an erroneous statement of the law, is to be presumed, in the particular case, to have done no harm; and so, is not a sufficient ground to justify this Court in granting a new trial—the case being one in which no motion for a new trial was made in the lower Court.

Misdemeanor, in Bryan Superior Court. Tried before Judge FLEMING, December Term, 1854.

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This was an indictment for buying cotton from a slave, without permission.

It appeared, by the testimony of William L. Walthour, that, having reason to suspect the defendant of purchasing cotton from his father's slaves, he had furnished one of them with a quantity of cotton and sent him to defendant's house, while he went to watch their proceedings: that defendant bought the cotton from the negro, paying him in liquor and tobacco; witness heard them also talk of a former transaction of the same kind, and made an arrangement for a future one.

Witness then procured a warrant, arrested the defendant, and found the cotton in his house. He stated that the proceeding was "a trap set to catch the defendant;" and that the negro had no written permission to sell the cotton. Here the testimony closed. Counsel for defendant requested the Court to charge the Jury, that they were the judges of the law, as well as the facts, and were not bound, in their finding, by any instructions the Court might give; that if this transaction was a trap laid to catch defendant, and the negro carried the cotton there, and sold it, by the commands of the witness, or the prosecutor, that they must find the defendant not guilty; that the indictment was defective, in not stating who was the owner of the cotton; and that the case was not made out in the proof, because there was no proof of whose property it was.

The Court charged the Jury, "that it was not necessary to allege or prove the ownership of the cotton in any person; that the Jury were the judges of the law, but were bound to declare the law as they knew it to be; that they assumed a great responsibility, if they undertook to decide the law differently from what it was held to be by the Court; but if they took the law from the Court, their skirts were clear; that the Court might be wrong, but they could not be wrong in taking the law from the Court".

The Court went on to charge, "that if the defendant bought the cotton from the slave, without written permission, he was guilty; and that it was no justification to him, that the witness

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or the prosecutor had sent the negro with the cotton; that while it is a misdemeanor to solicit another to commit a crime; yet, if any one has reason to believe that crime is being committed, it is not only lawful but praiseworthy, to ferret it out and to set traps to catch the offenders".

The Jury found the defendant guilty, and his Counsel excepted to the above stated charges of the Court, and assign error thereupon.

GAULDEN, for plaintiff in error.

Sol. Gen. LONG, and WARD & OWENS, for defendant.

By the Court.—BENNING J. delivering the opinion.

By the thirteenth section of the thirteenth division of the Penal Code, it is made a crime for any person to buy or receive, from any slave, "any cotton" as well as various other articles, "without written permission from the owner, overseer or employer of such slave, or some other person authorized to give such permission, authorizing such slave to sell and dispose of said money or other article or articles". (*Cobb Dig.* 827.)

(1.) According to these words, nothing but written permission can justify the buying or receiving of cotton from a slave.

The charge of the Court, on this point, was not as broad as this law. The charge was, in substance, that what was proved in the case, would not amount to a justification to the defendant for buying the cotton from the slave. The charge might have gone further, and said that there was nothing but a written permission, which would have amounted to such justification. The words of the law would have warranted a charge going that length.

The charge, then, on this point, was according to the words of the law.

[2.] The charge, that if any one has reason to believe that crime is being committed, it is not only lawful but praiseworthy to ferret it out and to set traps to catch the offenders, was a mere abstraction. Supposing it, however, to have been intended to

be applied to the facts of this case, it was, if wrong, entirely harmless; for, say that it was neither lawful nor praiseworthy in the prosecutor to use the means of detection which he used in this case—say it was a misdemeanor in the prosecutor to use them, yet would this misdemeanor in the prosecutor have justified the defendant in doing what he did—in buying the cotton from the slave without written permission? If it would not, of what consequence to the defence could it be, whether the Court told the Jury that the conduct of the prosecutor was lawful or not lawful, praiseworthy or not praiseworthy. And it would not, as we have seen.

But we do not mean to say that the charge, though harmless, was, in itself, wrong. What law does it violate? I know of none.

There was no motion in the Court below for a new trial; in this case.

[8.] The indictment follows the words of the Statute. (*Cobb's Dig.* 827.) And any indictment which does that is good. (*Id.* 832.) The Court, therefore, was right in telling the Jury that it was not necessary to allege or prove the ownership of the cotton in any person.

It is not true that the Court expressed any opinion, as to what had or had not been proved in the case.

The Court "charged the Jury that they were the judges of the law and the fact, and were not bound by any instructions the Court might give: but that the fact that they were judges of the law and the fact, did not release them from the obligation to find the fact as they believed it to have been proven, and to declare the law as they knew the law to be; that the Jury were judges of the law, but that they assumed a great responsibility when they undertook to decide the law contrary to the instructions of the Court. When you take the law from the Court your skirts are clear; the Court may be wrong, but you cannot be wrong in taking the law from the Court".

The latter part of this charge we think to have been erroneous.

What is the duty of the Jury, with respect to deciding what

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is the law by which they are to govern themselves? The sixteenth section of the fourteenth division of the Penal Code is in these words: "On every trial of a crime or offence contained in this Code, or for any crime or offence, the Jury shall be judges of the law and the fact; and shall, in every case, give a general verdict of "guilty" or "not guilty"; and on the acquittal of any defendant or prisoner no new trial shall, on any account, be granted by the Court". The meaning of this plainly is, that it is the Jury and not the Court—the Jury whose right and whose duty it shall be, to be the judges of both what the law is and what the fact is; that is to say, whose right and whose duty it shall be to judge—to decide both what the law is and what the fact is; and that after having judged—decided what the law is, and the fact is, they shall give their judgment—their decision in the form of a general verdict of "guilty" or "not guilty". Now if it is the duty of the Jury to judge—to decide—what the law is, they do not perform that duty when they let the Court decide for them what the law is, any more than they would perform it if they should let the Court decide for them what the facts are. And therefore, if the Court should happen to "be wrong," they would "be wrong in taking the law from the Court". Suppose a Court should tell the Jury that homicide, the most causeless, the most deliberate, the most malicious, is not a crime, or that homicide, without any malice—homicide, in the clearest self-defence, is a crime—is murder, and the Jury were to take the statement as law, and find accordingly, would not their conduct be "wrong"? What answer could they make when told—you, gentlemen, were made the judges of what was the law; you, therefore, were not bound to take for law, anything that was not law, come from whose lips it might. You, therefore, cannot shield yourselves behind the Court; you have done "wrong". They could make no answer to this.

We think the Court erred in this part of the charge. This part might be right under the Common Law; which leaves it optional with the Jury to decide the law for themselves, or to take it from the Court—to find a general verdict or a special

verdict. . . "Also, in such case, where the inquest may give their verdict at large, if they will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge". This is the text of *Littleton*, and *Coke* commenting on it; says, "Although the Jurie, if they will take upon them (as *Littleton* here saith) the knowledge of the law, may give a general verdict; yet, it is dangerous for them so to doe, for if they do mistake the law they run into danger of an attainr; therefore, to find the special matter is the safest way, where the case is doubtful". (*Obse Litt.* 228 a.)

Our Statute is different. It says, the Jury shall be the judges of the law and the fact, and shall, in every case, give a general verdict. It cannot, under this Statute, therefore, but be their duty, in every case, to decide, for themselves, what the law is. . . And this they do, indeed, of necessity, in every general verdict which they render. And they cannot render a special verdict. But if such a charge of the Court as this is right, they might, in substance, render a special verdict. The charge is, you cannot be wrong in taking the law from the Court. If that be so, the Court might say, you cannot be wrong if you simply find the facts, and leave it to the Court to annex the law to them; for what difference can it make whether the act of annexing the law to the facts is done by you or done by the Court—done by you in a general verdict, or done by the Court on your special verdict.

[4.] Still, although we regard what the Court said on this point as erroneous, we do not think it erroneous in a way to have done any harm in this case. . . What the Court had told the Jury to be the law, we think was the law, beyond a doubt. That being so, if the Jury followed it, the effect was only that they came to the same conclusion to which they would have had to come, had they followed the direct law itself. This we are at least bound to presume, are we not? Still, it must be admitted, that if taking the law into their own hands, they had come to a different conclusion, and had acquitted the accused, their acquittal would have been good; that is to say, if they had applied to the case, as law, something which we think not to have

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been law, that something, by their verdict, would, nevertheless, be law—the law of this particular case.

Speaking for myself, therefore, I doubt, exceedingly, whether this is an error of which it may be said that it could not possibly, *under the law*, have done the accused any harm. Still, as this is a case of no great consequence, and as this point was not much argued, I have felt at liberty to yield my doubt to the opinion of the other two members of the Court.

But it is proper to say, that as far as I am concerned, I do not consider this a closed question.*

There is nothing else in the case to be noticed. The judgment ought to be affirmed.

*Note—The Reporter is requested, by Judge Starnes, to state, that while he concurs in the judgment of affirmance, on this point, in this case, he does not assent to the reasoning by which that judgment is sustained—it being his opinion that the remark of the Judge below, in his charge, was substantially correct. That while the Jury are the judges, both of law and fact, in criminal cases, yet, when the Court gives them the Law correctly in charge, they cannot err in adopting his exposition.—*Reporter*.

No. 66.—GEORGE PETTINGALL, plaintiff in error, vs. EDWARD NOLAN, defendant.

[I.] Under the Act of 1837, (*Cobb's Dig.* 629,) giving summary jurisdiction to the Justices of the Peace of the City of Savannah, over a certain class of civil actions, where the amount in controversy does not exceed thirty dollars, exceptions must be taken to the judgment of the Court, at the time it is pronounced, as required by the Act of 1831, (*Cobb's Dig.* 623,) as to the same description of cases, when tried before the Judge of the Court of Common Pleas and the Mayor of the City; otherwise, the party aggrieved will not be entitled to a *certiorari*, as provided by the said latter Act.

Certiorari, in Chatham Superior Court. Decision by Judge FLEMING.

Pottingall vs. Nolan.

This was a case of *certiorari* from a judgment rendered by a Justice of the Peace, in the City of Savannah, and turned upon the construction of certain Acts applying to certain Courts of that City.

By the second section of the Act of December 26, 1831, to authorize the Judge of the Court of Common Pleas and Oyer and Terminer, and the Mayor of Savannah, to hold special and extraordinary Courts in certain cases, it is provided that said Judge or Mayor, after determining the cause, "shall forthwith, by the usual process of the Court, execute the judgment of said Court, in such cause, unless exceptions to such judgment shall be taken by either party, or the pronouncing such judgment; and if either party shall so except to any such judgment, it shall be his duty, forthwith, to apply to the Judge of the Superior Court of the Eastern District, for a *certiorari*, founded on such exception, which, if allowed by the Judge of said District, within twenty-four hours after the rendition of such judgment, shall be a *supersedeas* thereof," &c. (*Cobb's New Dig.* 623.)

By an Act amendatory of the above, passed December 23, 1837, it is provided, that in such cases, where the amount does not exceed thirty dollars "it may be tried by any Justice of the Peace in the City of Savannah, under the same restrictions as to petition, ~~note~~, affidavit, as set forth in the 1st section of said Act". (*Cobb's New Dig.* 629.)

In this case, the exceptions to the decision of the Justice, were not taken until the day after the rendition of the judgment; and on motion, the Court dismissed the *certiorari*, as having been improvidently granted, on the ground that the exceptions had not been taken at the time the judgment was rendered in the Justice's Court. And on this decision error is assigned.

LAW & BARTOW, for plaintiff in error.

SHEFTALL, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] By the Act of 1831, the Legislature conferred summary jurisdiction upon the Judge of the Court of Common-Pleas and Oyer and Terminer for the City of Savannah; and also upon the Mayor of the City of Savannah, for the trial of causes appertaining to seamen. (*New Digest*, 623.)

The 1st section of the Act directs that the proceedings under it shall be by petition, setting forth the nature of the case, supported by affidavit, that the party complaining cannot, without great inconvenience and damage, wait the determination of the cause by the ordinary course of the law.

The 2d section provides, that twelve hours' previous notice shall be given to the opposite party, of the time and place appointed for the hearing of the charge. And it further enacts, that the judgment of the Court shall be executed by the usual process, unless exceptions to the same shall be taken by either party on the pronouncing said judgment; and if either party shall so except, it is made his duty, forthwith, to apply to the Judge of the Superior Court of the Eastern District for a *certiorari*, which if allowed by the Judge, within twenty-four hours after the rendition of the same, shall operate as a *supersedeas* thereof. In case of the absence of the Judge of the Eastern District, time is allowed to the excepting party, until the return of the Judge, the applicant giving bond and security to the other party in the sum of \$200, conditioned to abide the final decision of the cause.

By the Act of 1833, a Jury trial is provided for these extraordinary Courts. (*New Digest*, 625.)

By the Act of 1837, (*New Digest*, 629) the same summary jurisdiction is conferred on any Justice of the Peace for the City of Savannah, over like causes, where the amount does not exceed thirty dollars, as were given by the original Act, to the City and Mayor's Court over larger sums, under the same restrictions as to petition, notice, affidavit and (as) set forth in the first section of the said recited Act."

Under this last Act, must exceptions to the judgment of the Justice of the Peace be taken at the time it is pronounced, as required to be done by the Act of 1831, to the decision of the City and Mayor's Court, or is the party aggrieved allowed to apply for a *certiorari* at any time, within the period fixed for that purpose, by the laws regulating proceedings in Justices' Courts, and without having excepted at the time of its delivery, to the judgment complained of?

The Act of 1837 is carelessly framed. The author of the Digest has undertaken to suggest one correction, namely: by substituting *as* for *and* in the clause which I have quoted. But a much more material mistake occurs in the body of the enacting clause. It recites the restrictions as to "petition, notice, affidavit, and or (as) set forth in the first section of the said recited Act", whereas, by reference to the Act of 1831, it will be found that the restriction as to *notice* is not contained in the first, but in the *second* section of that Act.

What are we to do then? Declare the law void on account of this error, or to give it force and effect by correcting the error, and then reading it as it was evidently intended by the Legislature? The latter course is obviously the proper one to be pursued under such circumstances.

The inquiry then recurs, when the Act of 1837 declares that Justices of the Peace shall try and determine all civil actions, the amount of which shall not exceed thirty dollars, and which, by the Act of 1831, the Judge of the Court of Common Pleas, or the Mayor of the City of Savannah, were authorized to hear and decide, "under the same restrictions as to petition, notice, affidavit and" or "(as)" or "and as set forth in the said recited Act", is the summary *certiorari* included in one of these restrictions? We think it is. Petition, notice, affidavit, (not *and* affidavit) are enumerated to designate the nature of the restrictions intended, and were not designed to comprehend the whole. If so, why did not *and* precede, instead of follow the word affidavit, so that the sentence would have read, petition, notice *and* affidavit? As it stands, three specifica-

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tions are made, and then reference is made to the balance of the restrictions, by referring to the Act in which they are fully set forth.

Such being the grammatical construction of the Act is it to be presumed, if there be any doubt as to the meaning of the words, that the Legislature would have made the difference contended for in these several forums, over the same subject-matter of litigation? These extraordinary Courts were constituted and invested with summary jurisdiction, avowedly to expedite this class of cases. Why such "hot haste" in bringing causes to a final determination, in the City and Mayor's Court, and yet permit them to "drag their slow length along" in the Justice's Court? And that, too, against all the analogies of the law regulating the proceedings in these several tribunals?

It is said in argument, that such a construction of the Statute will compel parties to employ Counsel, in the first instance. Better that they should do so, in controverted cases. Preventive is better than corrective justice. It is a fine field for the initiation of the junior members of the profession into the practice. Had our highly respected *young* brethren, Sheftall and Law, been engaged to represent these parties, on the trial before Mr. Justice Hart, this writ of error never would have been prosecuted.

Judgment affirmed.

No. 67.—ANDREW H. H. DAWSON, assignee, plaintiff in error, vs. FORTUNITO J. FIGUEIRO, defendant.

[1.] By the Act of 1818, to prevent debtors from assigning their property to some of their creditors, in preference to others, an assignment from which any creditor is excluded, is void as to him.

 Dawson vs. Figueiro.

Certiorari, from Richmond Superior Court. Decision by Judge HOLT.

The facts of this case are as follows:

F. J. Figueiro sued John J. Byrd, in the Court of Common Pleas in the City of Augusta, on a note for \$175, dated February 23, 1852, payable to Cromelien & Brother, and indorsed by them.

The plaintiff obtained judgment in this action. Pending suit, he had caused a summons of garnishment to be issued to Andrew H. H. Dawson, who answered that he had in his hands assets to the amount of about nine hundred and fifty dollars, which he held by virtue of a deed of assignment, executed on the 7th September, 1852; by which deed, Byrd had conveyed to Dawson the assets in question, to collect and realize the same, and "to pay to each and all of said Byrd's creditors the full sum due and coming to them from him, and a full and complete list of whom, with the true amount due to each, is contained in the exhibit hereto annexed, and marked C".

The deed went on to provide, that "if there was not enough to pay off and satisfy each and all my (said Byrd's) creditors, then to pay them *pro rata*, in proportion to the amount due and owing to each; and if the proceeds, as aforesaid, be more than sufficient to pay and satisfy every one of my creditors, then to pay and return to me the balance that may be left; if any, after paying all my creditors as aforesaid".

In the list of creditors annexed to this deed, the name of Figueiro did not appear; the names of Cromelien & Brother did appear as creditors, to the amount of \$488.²⁵/₁₀₀.

The Court of Common Pleas, held that this deed was void, as against creditors, and gave judgment against the garnishee, for the full amount of the judgment against defendant. From this judgment the garnishee sued out a *certiorari* from the Superior Court; and, on the hearing, the Superior Court affirmed the decision of the Court of Common Pleas: and on this decision error is assigned.

ANDREW H. H. DAWSON, for plaintiff in error.

G. J. & W. SCHLEY, for defendant.

By the Court.—BENNING, J. delivering the opinion.

[1.] The Act of 1818, to prevent assignments to a portion of creditors, to the exclusion and injury of the other creditors, of persons who fail in trade, or who are indebted, at the time of such assignment, has in it these words:

“That any person or persons, unable to pay his, her or their debts, who shall, at any time hereafter, make any assignment or transfer of real or personal property, stock in trade, debts, dues or demands, in trust to any person or persons, in satisfaction or payment of any debt or demand, or in part thereof, for the use and benefit of his, her or their creditor or creditors, or for the use and benefit of any other person or persons, by which any creditor of the said debtor shall or may be excluded from an equal share or portion of the estate so assigned or transferred, such assignment, transfer, deed or conveyance shall be null and void, and considered, in Law and Equity, as fraudulent against creditors”. If the assignment is one “by which any creditor shall or may be excluded from an equal share” of the estate assigned, the assignment is to be null and void.

Figueiro was the creditor of Byrd, the assignor. He was such by being the indorsee of Cromelien & Brother, the payees of the note in suit, made by Byrd. Figueiro is entirely “excluded” from the assignment. Cromelien & Brother are, it is true, included in the assignment, but not as the owners of this note. They are included in the assignment, as the owners of a note for \$488.²⁵/₁₀₀. So, as to the note in this case, which is for \$175, both Figueiro, the present holder, and Cromelien & Brother, the former holders, are “excluded” from the assignment.

The assignment, therefore, as to Figueiro, is void.

And the assignment being void, as to him, the property attempted to be assigned remained, as to Figueiro, the property

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of Byrd, notwithstanding the assignment; and the property being in the hands of Mr. Dawson, it was subject to this garnishment.

The judgment of the Court, to that effect, ought, therefore, to be affirmed.

No. 68.—JOHN C. DUDLEY *et al.* plaintiffs in error, vs. A. G. PORTER, defendant.

[1.] Where a father, by deed, gave a negro girl to his daughter "M S D, for and during her natural life, and to the heirs of her body, if any she should have, by W. S. D"; and afterwards, the grantor provided, that "should the said M S D die without a bodily heir by W S D, then the aforesaid negro girl and her increase, *shall then* be divided among my heirs, share and share alike": *Held*, that these words conveyed a life estate to M S D, a fee in the property to her children by W S D, if any were living at her death; and if no such children were then living, the same was to be divided among the heirs general of the grantor, as directed.

In Equity, in Effingham Superior Court. Decision by Judge FLEMING.

This case turned upon the construction of the following deed:

STATE OF GEORGIA, EFFINGHAM COUNTY:

This indenture, made the third day of April, in the year of our Lord, one thousand eight hundred and twenty-one, between Guilford Dudley, of the County and State aforesaid, of the one part, and Maria S. Dudley, of the same place, of the other part: *Witnesseth*, that the said Guilford Dudley, for and in consideration of the sum of one hundred dollars, to me in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed; and by these presents do grant har-

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gain sell and convey, unto the said Maria S. Dudley, during her natural life, and to the heirs of her body, if any she should have, by my brother W. J. Dudley, forever, a negro girl called Eliza, about three months of age, and her increase, to the said Maria S. Dudley, during her natural life, and the heirs of her body, if any she should have, by said W. J. Dudley, forever. To take into her possession, and to have and to hold the said negro Eliza during her natural life, to the sole and only proper use, and benefit, and behoof of the said Maria S. Dudley, during her natural life, and the heirs of her body, if any she have, by said W. J. Dudley, forever. And I, the said Guilford Dudley, for myself, my heirs, executors and administrators, all and singular the said bargained property, unto the said Maria S. Dudley, during her natural life, and the heirs of her body, begotten as aforesaid, shall and will warrant and defend the said negro Eliza from the claim or claims of any person or persons whatsoever; and by these presents, do warrant and defend. But should the said Maria S. Dudley die without a bodily heir by W. J. Dudley, then the aforesaid negro girl, Eliza, and her increase, shall then be considered as part of my property, and be divided among my heirs, share and share alike. In witness whereof I have hereunto set my hand and seal, this third day of April, eighteen hundred and twenty-one.

GUILFORD DUDLEY, [L. S.]

In the presence of

W. KING,

W. G. PORTER.

Maria S. Dudley died, leaving no children; and the present contest is between the complainants, claiming as the heirs at law of Guilford Dudley, and the defendants, as the heirs of Maria S. Dudley; and the point comes up upon a case made by agreement.

GAULDEN, for plaintiff in error.

LAW & BARLOW; WARD & OWENS, for defendant.

By the Court.—STARNES, J. delivering the opinion.

Do the terms of this deed import an intention to create an estate tail?

The grant is to "*Maria S. Dudley for and during her natural life, and to the heirs of her body, if any she shall have*" by the grantor's brother, Wm. S. Dudley, forever. These words plainly express an intention to create a life-estate in Maria S. Dudley—must they be construed to import an intention to create an estate tail in her children or the heirs of her body, by Wm. S. Dudley?

It is quite clear that this conveyance cannot be brought within the terms of any of the cases in which such or similar words have been held not to create an estate tail, unless it be that class of cases where subjoined or superadded explanatory words are found.

With an eye to this consideration, let us examine the super-added words in this deed, which may be looked to as in the nature of words explanatory.

We find, after reference to the heirs of the body, the words, "*If any she should have by my brother, W. S. Dudley,*" &c. These words can have no other effect than to confine the estate which the terms import, to the heirs of the body of Maria S. Dudley by W. S. Dudley begotten; and thus to turn what would otherwise be an estate tail general, in the line of the first taker, to an estate special; that is, an estate tail in the line of the said Maria S. by the said W. S. Dudley begotten.

We next find, at the conclusion of the deed, and after the clause of warranty, these words: "*But should the said Maria S. Dudley die without a bodily heir by Wm. S. Dudley, then the aforesaid negro girl Eliza, and her increase, shall then be considered as a part of my property, and be divided among my heirs, share and share alike.*"

The Court below thought this clause repugnant to the former parts of the deed; and as it is a rule of construction that in a deed where two clauses are in irreconcilable contradiction

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to each other, the first shall prevail, the learned Judge held that the latter clause in this deed was inoperative. The first part of the deed, by the use of terms which imported an intention to create an estate tail, vested a fee-simple in Maria S. Dudley—the latter gave her only a life estate; and as the two were thus repugnant, the first must prevail.

The general statement of this rule is undoubtedly correct. If two clauses in a deed cannot be reconciled, the first must prevail. But, if the latter be explanatory of the former, if it show that it was the grantor's intention to use the words in a sense different from what they seem to import—in a sense which coincides with the terms employed in the last clause, then *ex vi termini*, the latter clause is not repugnant to the former, and the former may be controlled by it. A grantor, for example, being without the assistance of a legal adviser, might convey property to A. B. and the heirs of his body, and at the end or conclusion of his deed, and before execution, append words to the following effect: "Being inexperienced and without Counsel, I am apprehensive lest I may have used the above words, *heirs of the body*, improperly, it being my intention, in their use, to signify the children of A. B.; and I wish so to be understood." There can be no doubt on the mind of any one, that these words would be sufficiently explanatory of, and not repugnant to the first part of the deed.

So if, in this point of view, the words before us may be regarded as explanatory, they are not repugnant to the first part of the deed, even admitting that their import is to create a life estate in Maria S. Dudley.

It is well known, that even in England, in conveyances of personal estate, where words are used importing an intention to create an estate tail, the Courts readily resort to referential construction and seize upon slight expressions in the instrument, for the purposes of explanation. When, then, in Georgia, where estates tail have been long prohibited—where all the presumptions are against them—where the words, *heirs of the body* have not that settled technical signification which they have in England—where no effect can be given to them

in that technical sense, and especially when (as in this case) the whole frame of the instrument shows that the writer was inexperienced in conveyancing, and without the aid of legal advice, *a fortiori*, a Court should readily lay hold on words or other portions of the instrument, which go to show that the grantor used the words, "heirs of the body", in the sense of *children*.

In the deed before us, the last clause of which has been quoted, the grantor provides, that "should the said Maria S. Dudley die without a bodily heir by W. S. Dudley, *then* the aforesaid property *shall then* be considered a part of my property, and be divided among my heirs, share and share alike".

Now the word *then*, as we have had occasion to say in another case at this term, is sometimes used as a word of reasoning—a particle of inference connecting the consequence with the premises, and sometimes as an adverb of time. In the first sense, it is equivalent to the expression, "in that event", or "in that case", or "therefore"; in the other, it means "at that time", or "immediately afterwards".

When, in the first sense, interposed between two limitations, it can have no effect in restricting the limitation to issue, living *at the death*. (*Beauclerk vs. Dormer*, 2 Atk. 808. *Candy vs. Campbell*, 8 Bligh N. S. 469.) Though the word was held, in these cases, to be there used as a word of inference, yet the reasoning, both of Lord Hardwick and Lord Brougham, shows that if the word be used as an adverb of time, it may then be regarded as having the effect of restricting the limitation to issue living *at the death*.

In the sentence which we are considering, and which is quoted above, the word is of course first used as a word of reasoning; but because this is so, it is evident, that when in the same connection, it is repeated, it is a word of time. Unless this be so, we attribute no meaning to its second use. It is a maxim of law, that effect will be given to all the words of an instrument, if this can reasonably be done. *Ut res magis, &c.* The sentence, therefore, may properly be read, "should the said Ma-

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riah S. Dudley die without a bodily heir, by W S D, *in that event*, the aforesaid property shall, *at that time*, be divided," &c.

But if the grantor intended that the property should go over to his heirs general, at the time of his daughter's death, without children or heirs of her body, the limitation over was not within the rule against perpetuities, and affords evidence that he did not have in his mind an indefinite failure of that daughter's issue, as without doubt, would have been the case, if he had intended by the words first used, to create an estate tail in the line of his daughter. And hence a strong presumption and inference, that he did not intend to create such an estate, in the first instance, and that he then used the words heirs of the body to designate certain individuals answering the description of children, at the death of his daughter.

Several cases in England, show that the Courts of that country, in construing limitations, proceed upon similar principles.

In the case of *Doe ex dem. Chandler vs. Smith*, (7 Bunn. & E. 532) a testator devised his lands to *A. and the heirs of her body forever, as tenants in common, and not as joint tenants*—and added a limitation over, if his daughter *should die without having issue on her body*. Here, the first words were held not to create an estate tail, because of the words of distributive direction "*as tenants in common, and not as joint tenants*". But the limitation over being held to contemplate a perpetuity, it was suffered to influence the signification of the first words so as to explain that by their use, the testator really did mean to create an estate tail. So in *Cook et al. vs. Cooper*, (1 East. 229.) *Pierson vs. Vickers and wife*, (5 East. 548,) and in *Bennett vs. Tankerville*, (19 Ves. 170,) a similar decision was made, and a limitation over, after an indefinite failure of issue, was allowed to control the signification of the words first used, which did not import an estate tail.

The converse of the proposition must be correct, (certainly in Georgia, where construction does not favor estates tail, nor the interests of the heir at law), viz: that words of limitation over, after a failure of issue at the death, may explain words

in the instrument previously used, which import an intention to create an estate tail.

We will only add, that it is the well settled doctrine of all the modern cases, that the words *heirs of the body* may be construed as words of purchase, whenever there is anything in the instrument, which shows that "they were used to designate certain persons, answering the description of heirs at the death of the party". (*Doe. vs. Colyear*, 11 *East*. 548. *Doe. vs. Jesson*, 2 *Bligh*. 2 *Doe. vs. Harvey*, 4 *B. & C.* 610. 4 *Kent Com.* 288.)

These views being correct, it results that this grantor conveyed a life estate in this property to Maria S. Dudley, and a fee to her children by W. S. Dudley, if any survived her; and that, if she died without such children living at her death, then his direction was that the same should be distributed among his heirs general.

Let the judgment be reversed.



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- count from the same. *Knight, adm'r, vs. Lasseter, adm'r*..... 150
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8. When he sues individually, and obtains judgment and execution, on which there is a return of "*nulla bona*", and execution for cost is issued by the officers of Court, such execution cannot be levied on property in the hands of an heir, received by him in settlement with the administrator. The title of the heir is not divested by such levy and sale. *Ibid.*
9. A Court of Equity will not interfere with the due administration of assets in the hands of an executor or administrator, upon slight grounds. To justify it, the bill should show good and substantial reasons to fear some probable injury at least to the rights and interest of the complainant. *Ashburn by pro. am. vs. Ashburn and another*..... 213
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2. The borrower is bound to take good care of the thing borrowed; to use it according to the intention of the lender; to restore it at the proper time, and to restore it in a proper condition. *Ibid.*
3. The borrower must return the increments or offspring of the thing lent. *Ibid.*
4. A loan being strictly gratuitous, the lender may terminate it whenever he pleases. *Ibid.*
5. The thing loaned is to be restored to the lender unless it has been agreed that the restitution shall be to some other person. If the lender be dead, it is to be restored to his personal representative, if known. *Ibid.*
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1. In a suit against a stockholder for the ultimate redemption of the bills of a bank: *Held*, that the best rule is, that a return of "nulla bona" on an execution against the assignee of the corporation, should not be considered conclusive against the stockholder, unless due and proper notice be previously given him that the *fi. fa.* is placed in the Sheriff's hands, with instructions to levy. *Lowe vs. Harris*..... 217

2. In an action against a stockholder who is bound for the ultimate redemption of the bills issued by a bank, "in proportion to the amount of shares and the value thereof, that each individual or company may hold in said bank, in the same manner as in common actions of debt", where the record does not show that there are any other bills of said bank due and unpaid, or that there has been any other recovery against this stockholder upon bills of the bank: *Held*, that the bill-holder is entitled to recover the whole sum claimed by him, if it do not exceed the amount of stock owned by the defendant: *Held*, also that should any other action be brought against the same stockholder on bills of the bank, when he has redeemed bills to the extent of his stock, he may plead such payment, in bar of any further recovery against him. *Ibid.*

3. The 8th rule of the Act of Incorporation of the Commercial Bank of Macon provides that the debts which the corporation shall at any time owe, shall not exceed three times the amount of the stock paid in, over and above the deposits in their vaults; and that in case of excess, the directors, under whose administration it shall happen, shall be liable for the same in their individual, natural and private capa-

cities, in an action of debt, to be brought against them, their or any of their heirs, executors or administrators, in any Court of Record of the United States, having competent jurisdiction of the subject, by any creditor of the corporation; and may be prosecuted to judgment and execution, any condition or covenant or agreement to the contrary notwithstanding: *Held*, that an action brought under this rule against certain directors who were guilty of an over-issue, did not abate by the expiration of the charter by its own limitation during the pendency and before the termination of the suit: *Held* also, that a creditor of the corporation is entitled to recover the amount of his debt or demand, and not the entire excess *in solido*.

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2. By our poor law system, the Justices of the Inferior Court have the right to inquire into the circumstances of the poor; to elect whom they will treat as a pauper, and who shall become chargeable to the coun-

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ty: and until it has done so by some act or order, no person can properly be said to be thus chargeable. *Ibid.*

3. The proper evidence that a bastard child has become chargeable to the county, is to be found in the payment, by the Inferior Court, of expenses after refusal or failure of the putative father to pay the same, or the granting of an order for such payment: *Ibid.*

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1. The Mayor and City Council of Macon, in accusing, trying and dismissing their Marshal, under and by authority of their charter and ordinances, upon a charge of malpractice in office, acted as a "judicatory", in the

cities, in an action of debt, to be brought against them, their or any of their heirs, executors or administrators, in any Court of Record of the United States, having competent jurisdiction of the subject, by any creditor of the corporation; and may be prosecuted to judgment and execution, any condition or covenant or agreement to the contrary notwithstanding: *Held*, that an action brought under this rule against certain directors who were guilty of an over-issue, did not abate by the expiration of the charter by its own limitation during the pendency and before the termination of the suit: *Held* also, that a creditor of the corporation is entitled to recover the amount of his debt or demand, and not the entire excess in *solido*.

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cts. per foot, 12½ cts." C A L produced two boxes, containing 2200 cotton samples, and offering to pay the freight thereon by measure, demanded their shipment by the *Alabama*, one of the company's vessels. Cotton samples were not mentioned in the freight list. It was a new business, lately sprung up, and it was proven that the customary freight on them was one cent per sample. *Held*, that the Company were not bound to ship these boxes, as such, by measure, without the payment of the customary rates. *Lamar vs. The N. Y. & S. S. S. N. Co.* 559

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1. Acts of the Legislature are not only presumed to be Constitutional, but the authority of the Courts to declare them void, will never be resorted to except in a clear and urgent case. *Boston & Gunby vs. Oumints* 162
2. *Ex post Facto* Laws extend only to criminal cases. *Ibid.*
3. A law may be *ex post facto*, and yet Constitutional. *Ibid.*
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5. Registry Acts, though retrospective, are Constitutional. *Ibid.*
6. Until the 38 of George III. it was the settled rule in the British Court, that an Act of Parliament, to take effect "from and after its passage", operated from the first day of the session. *Ibid.*

cities, in an action of debt, to be brought against them, their or any of their heirs, executors or administrators, in any Court of Record of the United States, having competent jurisdiction of the subject, by any creditor of the corporation; and may be prosecuted to judgment and execution, any condition or covenant or agreement to the contrary notwithstanding: *Held*, that an action brought under this rule against certain directors who were guilty of an over-issue, did not abate by the expiration of the charter by its own limitation during the pendency and before the termination of the suit: *Held* also, that a creditor of the corporation is entitled to recover the amount of his debt or demand, and not the entire excess *in solido*.

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ses where public policy would be promoted. *White vs. Crow*..... 416

2. Where A was liable as indorser for B, and B executed a mortgage to indemnify A against loss, and the property is sold under the foreclosure—and B, on the day of sale, co-operates with A, to have the property knocked off to him at an undervalue, so as to enable A to make himself harmless by a re-sale: *Held*, that an agreement to this effect, and that the proceeds should be applied to the extinguishment of the original indebtedness, is neither fraudulent or void, but binding on A; and having taken the Sheriff's deed and gone into possession of the premises, and realized a large profit from the re-sale, Equity will compel a specific performance of the contract. *Ibid.*

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See *Adm'rs, &c. 8*.

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1. Every one, whether bond or free, who is indicted for homicide, is, in legal intendment, indicted for killing a free white man. If the killing is of a slave or free person of color, or any one within the exceptional cases, the indictment should so charge it. *John (a slave) vs. The State*.....
2. Neither the Act of 1816 or 1821, relative to the trial of slaves and free persons of color, contain any dis-

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- visions, as to the various grades of homicide; and re-
course must be had, for this purpose, to the 4th divi-
sion of the Penal Code. *Ibid.*
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said M S D die without a bodily heir by W S D, also the aforesaid negre girl and her increase, shall then be divided among my heirs, share and share alike." *Held*, that these words conveyed a life estate to M S D; a fee in remainder to her children, if any were living at her death, and if no such children were living, a remainder over to the heirs general of the grantor. *Dudley vs. Porter*..... 618

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2. The 8th sec. was intended to provide a remedy similar to that in use in the Ecclesiastical Courts in England. *Ibid.*
 3. In partial divorces, there is no lien on the husband's property, until the rendition of the judgment. *Ibid.*
 4. Two concurrent verdicts are not necessary in cases of partial divorce. *Ibid.*
 5. Under the old Constitution, no Legislative interposition was required in cases of conditional divorce. *Ibid.*

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1. A possession which is the result of ignorance, inadvertence, misapprehension or mistake, will not work a disseizin. *Riley, adm'x, vs. Griffin et al.*..... 141
2. The rules as to the dignity and controlling effect of marked lines, natural objects, lines of adjoining lands, and courses and distances, laid down in every case. *Ibid.*
3. The latter occupy the lowest grade. *Ibid.*
4. Boundaries and corners may be proved by hearsay, from the actual necessity of the case. *Ibid.*
5. Where a line has been run and agreed on between adjacent proprietors, and acquiesced in, and possession held to it for 18 or 20 years, the parties and those claiming under them are bound by it. *Ibid.*

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2. The interposition of a Court of Equity, to correct mistakes, both as to law and fact, by ordering a proper deed to be executed, according to the true intent of the parties, is a very ancient doctrine. *Wyche and Wife vs. Greene*... .. 49
3. The case of *Lanadowne vs. Lanadowne* approved. *Ibid.*
4. In every case, under this head of Equity jurisdiction, the only inquiry is, does the instrument contain what the parties intended it should and understood it did? Is it their agreement? If not, it may be reformed by *aliunde* proof, so as to make it the evidence of what was the true bargain between the parties, and it is wholly immaterial from what cause the defective execution of the intent of the parties originated. *Ibid.*
5. If unequivocal testimony is required in ordinary cases, the antiquity of the transaction, as well as the fact that the donor himself was the draftsman of the instrument, increase the difficulty as to the satisfactoriness and sufficiency of the proof. *Ibid.*
6. A Court of Equity will not aid one volunteer against

another, nor will it enforce a voluntary contract. If, however, it be actually executed, then the Court will enforce all the rights growing out of it against any body. *Ibid.*

7. Where S purchased slaves from C & Co. through their agent D, giving his note in payment, without a delivery of the slaves, and D wrongfully and fraudulently detains the slaves, two of whom die in his hands, suit is brought on the note, and S files a bill, alleging that D had received hire as agent, and also that the living slaves had increased in value, beyond the price of the whole of them: *Held*, that there was no adequate remedy at Law. *Sargent vs. Caldwell and others*..... 64
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9. Under a creditor's bill filed against a third person, to reach and appropriate to the payment of debts a fund belonging to the defendant, a Court of Equity can better distribute the fund than a Court of Law, under a proceeding by garnishment. *Phillips vs. Wesson et al.*..... 137
10. The rule is stern and inflexible, that a party cannot ask for relief in Equity, on the ground that he has failed or omitted to make a legal defence at Law, even where the judgment at Law is manifestly wrong, unless it was the result of fraud or accident, unmingled with negligence on the part of himself or his agents. *Pollock, adm'r, vs. Gilbert, et'r*..... 398

11. If the complainant needed *discovery*, in order to defend the case at Law, he must go into Equity for that discovery, *before* the trial at Law. *Ibid.*

12. No degree of wrong or injustice in the determination of a case at Law will entitle the injured party to resort to Equity, unless there is some special ground for its interposition. *Ibid.*

13. But, when a cause involves matter exclusively within the jurisdiction of Equity, its final decision at Law will not preclude a re-examination in Chancery. *Ibid.*

See, also, *White vs. Crew*..... 416

14. The existence of an equitable defence that could not have been made available as a legal defence, is a sufficient ground for obtaining an injunction to restrain a Common Law proceeding, before or after judgment. *Ibid.*

15. Equity will interfere by injunction, either before or after judgment, whenever the cause is shown to involve matters purely of equitable cognisance, and essential to its proper determination. *Ibid.*

16. The general principle with regard to injunctions after judgment at Law is this: that any fact which proves it to be against conscience to execute such judgment, and of which the party could not have availed himself in a Court of Law, will authorise a Court of Equity to interfere by injunction, to restrain the adverse party from availing himself of such judgment. *Ibid.*

17. Will a Court of Equity in any case relieve against a mistake in pleading, or in the conduct of a case at Law? *Query?* *White vs. Crew*..... 416

18. Equity will not entertain jurisdiction, where there is an adequate remedy at Law. *Thompson vs. Manly et al.*..... 440
19. An equitable claim against the legatees of an estate, cannot be pleaded in defence of an action by an administrator, for a debt due the estate. But upon a bill filed by the creditor against the legatees and the administrator, setting forth that the legatees are non-residents, living in various States; that the debt to the estate was contracted upon the faith of this equitable claim; that there are no debts due by the estate; and these legatees are the only parties in interest, Chancery will decree payment of the claim out of the legacies. *Lyon vs. Howard*..... 481
20. If the wives of some of the legatees, through whom they claim, are not made parties, an amendment should be allowed. *Ibid.*

See *Adm'rs*, *fc.* 9. *Contract*, 1, 2. *Judgment*, 2, 3, 4. *Trusts and Trustees*.

EQUITY PLEADING AND PRACTICE.

1. When the complainant amends his bill after answer, if a farther answer to the amended bill is not waived, the defendant must answer the bill as amended, or the complainant will be entitled to an order taking the whole bill, as amended, confessed. *Tedder vs. Stiles.* 1
2. If the complainant amend his bill after answer, and does not waive a farther answer, the issue is not complete, unless the amendment be answered or the bill taken as confessed. *Ibid.*
3. If the complainant amend his bill and waive farther

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- answer, it is still the right of the defendant to put in an answer; but failing to do so within the time prescribed, his former answer may stand as an answer to the amended bill; but this rule does not apply where a farther answer to the amendment is required. *Ibid.*
4. Ordinarily, where the answer and replication are filed the second term, the cause should be set down for trial at the next, being the third term after filing bill. *Ibid.*
 5. The replication should be filed and the cause set down for trial before the proofs are taken. The replication may be filed, however, *nunc pro tunc*, after the proofs are taken. *Ibid.*
 6. Until the replication is filed, the defendant has a right to stand on his answer as true, having no notice that it will be controverted. *Ibid.*
 7. After a cause in Equity has been submitted to the Jury, the bill may be amended by the addition of exhibits, *Brown et al. vs. Redwyne and another*..... 67
 8. A bill seeking to propound for probate, a part of a will, against which there has been a verdict on the propounding of the executor named therein, should make that executor a party. *Barksdale et al. vs. Brown, guar* 95
 9. There is a bill and demurrer to it. Before decision on demurrer, plaintiff strikes out a part of his bill. It is afterwards re-inserted. Defendants plead answer, and demur. On the trial, in the midst of the argument before the Jury, they move to have this amendment taken off the file. Motion properly over-ruled. *Baall, ex'r, vs. Blake et al.*..... 119

10. Legatee need not, generally, be parties to a bill against the executor. *Ibid.*
11. One whose interest does not appear, is an improper party. *Ibid.*
12. Any one may be made a party to a bill, at his own instance, where, upon the case made, the Court sees it will promote justice. *Phillips vs. Wesson et al.*..... 187
13. Allegations in a bill, that a firm, "or some of the members composing said firm", had obtained control of certain *fi. fas.* "by purchase or otherwise", and such like, are too loose and uncertain, and demurrable therefor. *Green, Tracy & Co. vs. Brown & Dimick*..... 164
14. The rule, as to effect of an answer, unless contradicted by two witnesses, &c. explained. *White vs. Crew*... 416
15. The rule, as to what constitutes a sufficient answer.
Pitts and another vs. Hooper..... 442
 See, also, *Jordan vs. Jordan*..... 446
16. An amendment to a bill will not be allowed, when it has no equity in itself, and would make the original multifarious, especially if it bring the defendant out of his county. *Jordan vs. Jordan*..... 446
17. A bill cannot be taken *pro confesso*, when a plea in bar stands undisposed of. *Ibid.*
18. A bill cannot be sustained, which seeks to charge the defendant as administrator—at the same time denying that he is such. Leave will be granted, however, to amend by striking out that portion which controverts the trustee's appointment. *Thompson vs. McCluslock*..... 527

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ERROR.

1. Wherever the rights of a party have been withheld or violated, the presumption of law is, that he has been injured. *Tedder vs. Stiles*..... 1

ESTATES.

See *Deed*, 2; *Devise and Legacy*.

ESTATES TAIL.

See *Deed*, 2; *Devise and Legacy*, 4.

ESTOPPEL.

1. A person having the paramount title to land, who not only acquiesces in the sale of it as the property of another, but encourages the same, is afterwards estopped from asserting his legal title against the purchaser. Whether, by making it satisfactorily to appear that he was ignorant that the land was included in his grant, and making compensation for the injury he has occasioned, he is relieved from the rule? *Query? Burkhalter vs. Edwards*..... 588

See *Gift*, 2.

EVIDENCE.

1. A father makes to his daughter an instrument, in writing, ambiguous, as to its meaning an advancement or a gift, over and above her portion: *Held*, that though the legal presumption is, that he intended an advancement, such presumption, at least in Equity, may be rebutted by parol evidence of the contrary intention. *Pilbips, guar. vs. Chappell and another*..... 16

2. Parol admissions, by the father, after the conveyance, may be given in evidence against a son claiming as heir. *Ibid.*
3. Admissions of the deceased person, that the conveyance was founded on a valuable consideration, would not have the effect of setting up a will, by parol. *Ibid.*
4. Hearsay, admissible to prove boundaries and corners, in ejectment, from the necessity of the case. *Riley, adm'r, vs. Griffin et al.*..... 141
5. Where a witness for the State has been impeached, it is competent for the State to introduce other testimony, as to the facts testified to by the discredited witness. *John (a slave) vs. The State*..... 200
6. Rule stated, as to secondary evidence, of a lost deed. *Marshall vs. Morris*..... 368
7. Where a witness swears that he has seen the instrument presented to him before, and was present when the same was executed: *Held*, that this is equivalent to an affirmative statement, that by ocular proof the witness knew that the instrument had been executed in his presence. *Mosely vs. Gordon*..... 384
8. Testimony, by itself vague, and apparently not relating to matter in issue, may be made certain in its character, and plainly relevant, by other facts in proof. *Ibid.*
9. Testimony, as to a man's general character and reputation, in the treatment of his slaves, is nothing more than hearsay, and is inadmissible. *Ibid.*
10. Where there is strong presumptive evidence, that subsequent to a written contract, the parties agreed, orally, upon a new contract, which was a modification of the former, testimony may be received of negotiations

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and conversations between the parties, previous to the written contract, for the purpose of throwing light upon and showing more clearly the nature and character of the subsequent agreement. *Collins vs. Lester*..... 410

11. Nothing is better settled than that the case of an agent falls within a class which forms one of the special exceptions to the general rule, that a witness interested in the subject of the suit, is not competent to testify on the side of his interest. And this exception extends to every species of agency or intervention by which business is transacted, unless the case is controlled by some other rule. *Ibid.*

12. To make a certificate from the Executive Department admissible in evidence, it is not necessary that the certificate should give a copy of that to which it relates. It is sufficient that it gives, *substantially*, the contents or a part of the contents, of the thing to which it relates. *Henderson vs. Hackney*..... 521

13. A grant to Elias Nicka, is not varied or contradicted by evidence, that the grantee was sometimes known as Eli Nicka. *Ibid.*

14. The Court or Jury may compare two documents together, when properly in evidence, and from that comparison, form a judgment upon the genuineness of the handwriting, or the identity of the writer. *Ibid.*

- See *Attorney*, 1; *Eq. Practice*, 14; *Judgment*, (For.)
1, *Partnership*, §c. 1; *Statutes*, 1; *Witnesses*.

EXECUTION.

See *Admr's*, §c. 8.

EXECUTORS.

See *Admr's*, §c.

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EXTINGUISHMENT.

See *Banks*, 8.

FAILURE OF CONSIDERATION,

1. May be pleaded to a joint and several note, sealed by the principal, but not sealed by the surety. *Albertson et al. vs. Holloway*..... 377

FRAUD.

See *Contract*, 1, 2. *Estoppel*, 1.

FRAUDS—STATUTE OF.

1. Sales by auction are within the Statute of Frauds. Whether judicial sales are exempted from the operation of the Act? *Query?* *White vs. Crew*..... 416

See *Estoppel*, 1. *Practice Superior Court*, 1.

FRAUDULENT ASSIGNMENT.

See *Assignment*.

GARNISHMENT.

1. If A fraudulently transfers property to B, to avoid the payment of his debts, the remedy by garnishment against B is not so full and complete as a proceeding in Chancery. *Phillips vs. Wesson et al.*..... 137

GIFT.

1. When, shortly after the marriage of the daughter of B, and when she and her husband were about leaving

INDEMNITY.

for home, B brought out a negro-girl slave and said, "Here is this girl; you can take her home with you; she is not worth much; she can pick up chips; I do not give her to you now, but I never expect to take her back": *Held*, that these words did not amount to a gift of the slave, who was afterwards bequeathed to the daughter in the will of B. *Freeman, adm'r, vs. Flood* 529

2. A daughter, who permits a negro slave to go into the possession of her son-in-law, is not estopped from setting up, that by the will of her father, she was restrained from alienating this property. *Ibid.*

GRANTS.

1. Lands may be twice granted for many practical purposes. *Burkholder vs. Edwards*..... 583

GUARDIAN.

1. A testamentary guardian of the property of orphans has no right, as such, to recover of the administrator of a third person a legacy left to his ward. *Poe, adm'r, vs. Kelly*..... 634

HEAD-RIGHTS.

See *Land Laws*, 1.

HEIRS.

See *Administrators, &c. B.*

HUSBAND AND WIFE.

1. Where the husband acts as trustee *de facto* of the wife, he must discharge all his duties as such; and failing to

do so, the consequences will be visited upon the cestui
que trust. *Boston & Gunby vs. Cummins*..... 102

2. Where a *feme covert* possesses and enjoys all the rights and powers of a *feme sole* over her separate estate, she must perform the corresponding obligations of one. *Ibid.*
 3. No particular form of words is necessary in order to create a separate estate in a married woman. It is enough if there be a clear intention to exclude the marital rights of the husband, thus: "I give to my daughter, V W, two negroes, to remain in her possession, and for her special use and behoof, during her natural life; and at her death, to go to her children forever, and to no other use whatever," creates a separate estate, especially when their meaning is aided by other statements in the will. *Freeman, adm'r, vs. Flood*..... 528
 4. Neither is any particular form of words necessary, to restrain alienation of such an estate, but the intention must be clear. And subject to this rule, the words "to no other use whatever," explained by other words in the will and associated in the same sentence with the words "to remain in her possession," &c. operate as a restraint upon alienation. *Ibid.*
- See Divorces. *Marriage Settlement*, 1.

INDICTMENT.

1. An indictment which follows the words of the Penal Code is good. *Ricks vs. The State*..... 600

INFERIOR COURT.

- See Land Laws, 1.

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INSOLVENT DEBTORS.

1. A discharge under the Honest Debtor's Act, exempts only the body of the defendant from arrest, at the instance of the creditors who were parties to the proceeding. *Phillips vs. Wesson et al.*..... 137
 2. All the property which the debtor owned at the time, whether included in his schedule or not, is subject to the judgment. *Ibid.*
 3. The issue authorized to be formed under the Insolvent Laws of this State, is to compel a disclosure of concealed effects, and not to try the title to property in the hands of third persons. *Ibid.*
 4. An insolvent debtor is not entitled to have *two* watches exempt from levy and sale. *Query* as to one? *Smith vs. Rogers*..... 479
 5. The "implements or tools" of his wife's "calling or or trade" are not exempt. *Ibid.*
- See *Assignment*, 1, 2. *Garnishment*, 1.

JUDGMENT.

1. The judgment of a Court of Ordinary recites facts, giving to the Court jurisdiction: *Held*, the Superior Court must presume the recitals to be true until proven to be untrue. *Brown et al. vs. Redwyne and another* . 67
2. Where a purchaser of property buys a judgment having lien on such property, and causes it to be levied on other property belonging to defendant *in fi. fa.* the proceeds of the sale of which are claimed by younger judgment creditors: *Held*, that a Court of Equity cannot properly compel a satisfaction of the elder judg-

- ment out of the property so purchased. *Green, Tracy & Co. vs. Brown & Dimick*..... 164
3. Where property, subject to such older judgments, belonged to a firm, of which the defendant in *fi. fa.* was a member, which was liable to pay the debts of said firm, and was also claimed as the private property of the survivor: *Held*, that the survivor is in the position of one who has a fund in his hands, on which there are two liens or claims, and that in Equity he would have the right to insist that these older *fi. fas.* should be turned upon a fund in Court, the individual property of the defendant in *fi. fa.*: *Held* also, that if on such fund there was the lien of younger judgment creditors, then, as they and the surviving partner were all innocent claimants, with equal equities, a Court of Chancery could not properly interfere between them. *Ibid.*
4. The fact that older judgment creditors have laid by and neglected to enforce their rights, but allowed money raised from defendant's property to be paid to younger *fi. fas.* without fraud, collusion or advantage gained to the older plaintiffs in *fi. fa.* is simply negligence, and a Court of Chancery would not declare it a satisfaction of the debt. *Ibid.*
5. That matters which have received a judicial determination cannot be called again into controversy, applies with full force, not only in the same forum, but also as between Courts of Law and Equity. *Pollock, adm'r vs. Gilbert, ex'r*..... 398
6. A remitted judgment of the Supreme Court has as much effect and operation in the lower Court, where there is no *supersedeas* as where there is. *Jordan vs. Jordan and another*..... 446

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7. Judgments are evidence between parties and privies.
Brock vs. Garrett..... 487
8. A judgment rendered by a Court having jurisdiction, binds the parties until set aside, notwithstanding the existence of irregularities previous to the judgment, provided those irregularities are such as may be waived by the parties. *Bradwell, Ordinary, vs. Spencer, adm'r*..... 578
9. Judgment against the principal is *prima facie*, but not conclusive evidence against the surety. *Ibid.*

JUDGMENT (FOREIGN).

1. It is to be presumed that a purchaser under a judgment in Alabama, acquired the title which the defendant had. *Brock vs. Garrett, trustee*..... 487

JURISDICTION.

1. When the jurisdiction of a Court of Law has once attached to a case, its decision is final as to all matters within its cognizance, and operates as a bar to their subsequent litigation in the same or any other tribunal. *Pollock, adm'r vs. Gilbert*..... 398

JURY.

1. A remark by a Juror at the moment of the trial, who knew neither the offender nor the offence, made for the purpose of disqualifying himself, is no disqualification. *John (a slave) vs. The State*..... 200
2. Before a defendant in a criminal case shall be considered as having used due diligence, should he not place the Juror on his *votr dire*? Query? *Ibid.*

LAND LAWS.

1. By the Laws of Georgia, the Inferior Courts have no power to issue land warrants. The power is given exclusively to a Land Court, consisting of three Justices of the Peace. *Landers vs. Davidson*..... 587

LAPSE OF TIME.

See *Equity*, 1.

LAWS.

See *Constitutional Law*, 8, 9. *Registry Acts*, 6.

LEGACY.

See *Devise and Legacy*.

LIEN.

See *Attachment*, 1. *Vendor's Lien*, 1, 2.

LIMITATION OF ACTIONS.

1. If the right of action be once barred in a *tert*, no subsequent acknowledgment will take it out of the express language of the Statute of Limitations. In cases of *assumpsit*, an acknowledgment has this effect, because it amounts to a new promise. *Goodwyn vs. Goodwyn*... 114
2. But in case of *tert*, the acknowledgment may be proved for the purpose of showing that, within the term the defendant had admitted his possession to be not adverse to the plaintiff. *Ibid*:
3. If the real owner encourages another to grant a part of his land as vacant, and to occupy it for seven years,

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by cutting timber, trees, &c. claiming it as his own, it constitutes such a possession as will mature into a Statutory title, as against the real owner. *Burkhalter vs. Edwards* 588

See *Ejectment*; *Equity*, 1.

LOAN.

1. A loan implies that the use of a thing is parted with, for a limited time and for a special purpose—the right of property remaining in the lender. An estate, therefore, which can never revert, cannot be a loan. *Bond vs. Tenure* 20

See *Bailment*, 1 to 7; *Devise and Legacy*, 1, 2; *Gift*, 1; *Remainder and Reversion*, 2.

MACON.

1. Gambling by the Marshal within the city, does not constitute such malpractice in office, or neglect of duty, as was contemplated by the third section of the amended charter of 1850. *The Mayor, &c. vs. Shaw* 172

MANDAMUS.

See *Adm'rs*, &c. 2.

MANUMISSION.

See *Slaves*, 3, 4.

MARRIAGE SETTLEMENT.

1. Marriage is a valuable consideration, and sufficient to support a deed; and if the woman is guilty of no fraud, and enters into the settlement without notice of a debt,

she stands upon the same footing with other bona fide purchasers without notice. *Marshall vs. Morris*..... 368

See *Assignment*, 1; *Husband and Wife*, 3, 4.

MISTAKE.

See *Equity*, 1 to 5.

NEW TRIAL.

1. The Supreme Court will not reverse a decision below, granting a new trial, on the ground that the verdict was against the weight of evidence, unless the discretion has been abused. *Parker vs. Walden*..... 27
2. Where a new trial is sought on the ground of "newly discovered evidence", an affidavit by the party, that "he was not apprised of the existence and materiality of the evidence until after the verdict": Held insufficient, especially where it is doubtful whether it would change the result. *Carlisle vs. Tidwell, adm'r*..... 33
3. A new trial will be granted, if the verdict is contrary to the evidence. *Long vs. Lewis*..... 154
4. The admission of legal testimony, at any stage of the trial, can be no ground for reversing a judgment. *John (a slave) vs. The State*..... 200
5. If the verdict can be sustained, as to amount, by any calculation which the evidence will reasonably authorize, whether it be the same made by the Jury or not, a new trial should not be granted. *Dacey vs. Gay*.... 203
6. Where suit is brought on an open account for board, and the testimony establishes that a certain portion of it is due, but leaves it uncertain as to the remainder,

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- the Jury are bound to find a verdict at least for the amount proven. *Belcher vs. Gray and another, ex'rs.* 208
7. Ordinarily, a new trial will not be granted, merely because irrelevant testimony has been admitted. *Marshall vs. Morris*..... 368
8. A new trial will not be granted, when it must result as the first. *Ibid.*
9. The Statute of 1850, as to Judges giving their opinion upon the evidence, does not refer to the case where the Judge, in his charge, merely recapitulates undisputed facts. *Ibid.*
10. A verdict against law ought not to be allowed to stand. *Brock vs. Garrett, trustees*..... 487
11. A new trial will not be granted for an error which was entirely harmless, where no motion was made for a new trial in the Court below. *Bicks vs. The State*.. 600
- See *Change of the Court*; *Criminal Law*, 7; *Jury*, 2.

NON-SUIT.

See *Practice Superior Court*, 1, 2.

PARTNERS AND PARTNERSHIPS.

1. A subscribes the name of a firm of which he claims to be a member, to a contract of sale. B, his partner, ratifies the act, by receiving the purchase-money, &c.: *Held*, that this ratification being established, it is competent to give in evidence the declarations of A, as to the partnership, made at the time of the sale. *Drumright et al. vs. Philpot*..... 424

2. A partner cannot bind his co-partner by deed, as a general rule, but a prior authority or a subsequent ratification, not under seal, either express or implied, verbal or written, is sufficient to establish the deed as the deed of the firm, and binding upon it as such. *Ibid.*

PLEADING.

1. The rule as to pleas "*non est factum*", applies only where the execution or *factum* of the paper sued on, is alleged to be the act of the party filing answer or adopted by him. *Lane vs. Harris*..... 217

See *Admr's*, *fc.* 6, 7.

PRACTICE SUPERIOR COURT.

1. When the suit was for overseer's wages, on a contract for thirteen months, and it did not appear whether the contract was or was not in writing, a motion for a non-suit, on the ground that the case was within the Statute of Frauds, is properly over-ruled, the presumption being in favor of the legality of the contract. *Long vs. Lewis* 154
2. If essential allegations in the declaration are not proved, a non-suit should be awarded. *Ibid.*

See *Amendment*.

PRACTICE SUPREME COURT.

1. Questions on demurrer, amendments to pleadings, &c. are constantly brought before the Supreme Court, not distinctly presented or decided below. This practice condemned. *Wyche and Wife vs. Greene*..... 49
2. Where a writ of error is sued out to a decision on a de-

- murrer to an amended bill, parties not served with the amendment need not be made parties to the writ of error. *Wyche and Wife vs. Greene*..... 49
8. It is not necessary to state, in the bill of exceptions, the grounds of objection to the judgment complained of—stating the judgment excepted to is sufficient. *Barksdale et al. vs. Brown, guar*..... 95.

See *Judgment*, 6.

PRINCIPAL AND AGENT.

1. When the question is one of diligence, between a bank and its agent, it is not competent for the latter to protect himself by proving the custom of another Bank, in providing its agents with suitable buildings and iron safes, for the purpose of keeping securely the money of the principal. *Wright et al. vs. The Central R. R. & B'k'g Co.*..... 88
2. It is competent for an agent, who has been robbed of the money of his principal, to show that banks and other custodians of money look to their vaults and safes for security, and not the outside fastenings of the buildings in which it is kept. *Ibid.*
3. An agent, for hire, without specific instructions, is bound to observe all the precautions ordinarily pursued in relation to the particular business in which he is employed; and according to the usage of the place, and the circumstances of the times within which the business is transacted. *Ibid.*
4. Where A acting as the agent of M, in the sale of a negro slave; executed, with D, a joint sale of said slave and another belonging to A, and they, together, make and deliver to G a joint bill of sale, warranting the

soundness of both slaves, signing the instrument D & A; and afterwards, an action is brought by G against M for alleged unsoundness of the slave sold for M: *Held*, that though A may have transcended his authority, as agent, by uniting with D in said sale; yet, that inasmuch as he was authorized by M to sell and warrant his slave, effect will be given to the deed as against M, so far as that slave is concerned. *Mosely vs. Gordon* 384

5. Where an agent executes his authority, and does something beyond, the excess only is void—the execution good. *Drumright et al. vs. Philpot*..... 424

See *Evidence*, 11.

PRINCIPAL AND SURETY.

See *Judgment*, 9.

PROCESS.

1. Process not issued in compliance, substantially, with the requirements of the Judiciary Act of 1799, or the Amending Act of 1840, is null and void. *Little vs. Ingram et al.*..... 194
2. Where defendants in ejectment agree to waive process, and go to the Clerk to acknowledge service and make the waiver, which waiver was omitted by mistake of that officer, and after verdict and writ of possession, an affidavit of illegality was filed, on the ground that no process was attached: *Held*, that upon proof of such accidental omission, the waiver might be supplied *nunc pro tunc*. *Ibid.*
3. It was error in the Court to refuse a continuance, to procure the testimony of one of the defendants to such waiver. *Ibid.*

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PROMISSORY NOTES.

See *Bill of Exchange*, 1. *Bond*. *Failure of Consideration*, 1.

RECEIVER.

See *Trusts and Trustees*, 1.

REGISTRY LAWS.

1. Registry Acts may be passed to have effect upon conveyances already executed. *Boston & Gunby vs. Cummins* 102
2. The policy pervading our Registry Acts has existed since 1755. *Ibid*.
3. Our law makes no distinction between conflicting conveyances under the Registry Acts, and contests between grantees and judgment creditors. *Ibid*.
4. The Act of 1847, as to registry of marriage settlements, makes no exception in favor of *feme coverts*. *Ibid*.
5. That Act is drawn with technical skill and accuracy, and should be enforced in good faith. *Ibid*.
6. Exceptions engrafted on Statutes by the Courts, give rise to the uncertainty of the law. *Ibid*.
7. The policy of our Registry Acts traced to the Colonial and Provincial Governments. *Ibid*.

REMAINDER AND REVERSION.

1. A remainder is the remnant of an estate, limited to arise immediately on the determination of a precedent particular estate, and it always creates a *new* estate in the remainder man. *Booth vs. Terrell*..... 20
2. This Court has never decided that a reversion in personalty could not be created by parol. *Ibid.*
3. A reversion is the return of an estate to the grantor and his heirs after the grant is over; a gratuitous permission, by the owner to a third person, to use a chattel for a specified time, the proprietary interest still remaining in the owner, is not a reversion. *Ibid.*

RESCISSION OF SALE.

See *Sale*, 1.

SALE.

1. If the seller knows of a defect in the title to a part of the thing sold, material to the enjoyment of the whole, and conceals or misrepresents it to the buyer, who is ignorant of it, Equity will decree a rescission of the sale. *Crutchfield vs. Dannelly*..... 432

See *Vendor and Purchaser*, 1.

SET-OFF.

See *Equity*, 19, 20.

SLAVES AND FREE PERSONS OF COLOR.

1. Where D is found in possession of, harboring, controlling and hiring out a negro slave, a few months after he

had wrongfully left the possession of his owner, and under circumstances which should have put D upon inquiry as to the ownership of the slave, and no such inquiry is made: *Held*, that D might be presumed to have come into the possession of the slave by enticement or other unlawful means, and is accountable for hire from the time of the disappearance of the slave. *Dacey vs. Gay*..... 203.

2. Upon a trial for breach of warranty of soundness of a slave, it is proper for the Court to charge, that "if the seeds of the disease were in the negro at the time of the sale, though not developed until afterwards, and the negro died of the disease which was then upon him; this would be a breach of the warranty." *Moseley vs. Gordon*..... 384

3. Where a testator, after naming sundry slaves, male and female, adds "on account of the faithful services of my body servant William (the husband of Peggy) I will and desire his emancipation or freedom; with the future issue and increase of all the females mentioned in this item of my will. If it is compatible with the humanity, &c. of the authorities of the State of Georgia, I direct my qualified executors to send the *said slaves* out of the State of Georgia to such place as they may select, and that their expenses to such place be paid by my executors out of my estate. The whole proceedings to be conducted according to the laws and decisions of the State of Georgia—I having no desire or intention to violate the spirit, or intention, or policy of such laws. Further, I desire that the said slaves, if compelled, may select their residence out of the State of Georgia, and in any part of the world." The will directing the forfeiture of the interest of any legatee resisting this item: *Held*, that the intention of the testator was to manumit all the slaves mentioned in this item of his will. *Clegg and et al. vs. Waters et al.*..... 496

TRUST

Section 1. Where, pending a proceeding in Chancery, for the removal of a testamentary trustee, application is made

Section 2. Where, pending a proceeding in Chancery, for the removal of a testamentary trustee, application is made

Section 3. Where, pending a proceeding in Chancery, for the removal of a testamentary trustee, application is made

TRUSTEES

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the appointment of a receiver, a strong case must be made by the complainant, before the Court will interfere. It is not enough to allege that the trustee's acts are bad, and his conduct to *cestui que trust* capricious; there must appear reasons for fearing that the property will not be forthcoming to answer the decree. *Poythress vs. Poythress*..... 406

Husband and Wife, 1, 3, 4.

VENDOR AND PURCHASER.

The doctrine that a purchaser without notice is entitled to the protection of the Courts, applies where there is prior equitable title only, but not where there is prior legal title. The rule then is *caveat emptor*. *Daniel vs. Hollingshead*..... 190

Judgment, (Foreign) 1; *Sale*.

VENDOR'S LIEN.

The surety, who was such before the sale, and with whom title deeds are deposited as collateral security, is such a *bona fide* creditor as to defeat the vendor's lien. *Mounce vs. Byars et al*..... 469

Where does this deposit of the deeds, as an equitable mortgage, place the surety upon the footing of a *bona fide* purchaser without notice. *Ibid*.

VOLUNTEERS.

Equity, 6.

WARRANTY.

Wares; &c. 1.

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WILL.

1. Where a will is absurd or ambiguous, as it stands, the Court may supply words to carry into effect the intention of the testator, when that intention is clearly manifested. *Cleland et al. vs. Waters et al.*..... 496

See *Devise and Legacy* ; *Equity Practice*, 8.

WITNESSES.

1. Where witnesses, sustaining the general character of an impeached witness, admit that they never heard the neighbors speak of his truthfulness, still their evidence may be weighed and considered by the Jury.* *Taylor and Wife vs. Smith*..... 7
2. A party cannot discredit his own witness. He may show, however, that the fact is different from what the witness has stated. *Burkhalter vs. Edwards*..... 583

See *Attorney at Law*, 1; *Evidence*, 14.





